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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can a College which concededly operates no program or activity receiving federal assistance be made subject to Title IX of the Education Amendments of 1972 solely because some of its students receive federal grants limited to educational purposes?

2. Is the College's entire operations subject to Title IX regulation where the College itself receives no federal financial assistance, but where some of its students participate in direct student assistance programs over which the College can exercise no selection or control?

3. May the Department of Education terminate direct grants to students, without a finding of discrimination in any program which receives federal financial assistance, solely because their College refused to sign an Assurance of Compliance?

4. Does the application of Title IX regulation to the College and its students violate First Amendment rights to academic freedom and association?

PARTIES

The caption of the case in this Court contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Reproduced at Appendix (hereafter "A") A 1) is reported at 687 F.2d 648 (3d Cir. 1982). The opinion of the District Court (A 45) is reported at 500 F.Supp. 253 (W.D. Pa. 1980). The decision of the Administrative Law Judge (A 89) is not reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 12, 1982. (A 99). Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and regulations, reproduced in relevant part in the Appendix, are involved in this petition:

1. The First Amendment to the United States Constitution (A 101).
2. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). (A 101).
3. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682. (A 105).
4. The regulations of the Department of Education, 34 C.F.R. Part 106.[1] (A 106).

STATEMENT OF THE CASE

This case presents to this Court a situation in which the Department of Education is terminating the financial assistance of students who attend Grove City College, claiming the authority to do so under Title IX of the Education Amendments of 1972, whose purpose is to outlaw sex discrimination. Grove City College, it is conceded, does not discriminate. Grove City College also has no control over the federal aid programs in which its students participate. Those students who attend the College will lose their Federal financial assistance solely because the College will not execute an Assurance of Compliance with Title IX.

Petitioner Grove City College ("College") is an independent, co-educational liberal arts college located in western Pennsylvania. Since its founding in 1876, the College has refused consistently all forms of government assistance, whether federal, state or local. The decision to forego participation in government construction, research, and assistance programs is

[1] When this lawsuit commenced, these regulations were administered by the Department of Health, Education and Welfare (HEW) and were codified at 45 C.F.R. Part 86. They were recodified at 34 C.F.R. Part 106 in virtually identical form on May 9, 1980, in connection with the establishment of the Department of Education. 45 F.R. 30802, 30962-3 (1980).

premised on the College's belief in institutional self-sufficiency and autonomy. In addition, the College believes that its commitment to deliver high quality education at minimal cost would be significantly impaired if it were obligated to comply with the expensive and burdensome regulation which invariably follows government funding.[2] This decision is not based on any disagreement with Title IX's non-discrimination requirements. To the contrary, even before Title IX was enacted, the College claimed no right to discriminate and maintained a policy of non-discrimination.[3]

In July 1976, the Department[4] requested that the College execute the agency's Form 639A (A 124), an Assurance of Compliance in the form required by 45 C.F.R. §86.4.[5] The Assurance required that the College acknowledge that it was operating federally funded educational programs and was therefore subject to all regulations implementing Title IX. *See* 45 C.F.R. Part 86.

[2]Despite endowment income of less than $250 per student and notwithstanding the lack of any government funding, the College's current tuition, fees, room and board charges for its 2200 students average less than $4350 per student per academic year, significantly less than other independent institutions of its quality. The College's operating practices are different than other institutions. Making its operations as efficient as possible, it has only 17 administrators and a Board of Trustees very active in the operation of the College. It is a living example of diversity in American higher education, proving that an excellent education can be obtained at less cost than prevailing wisdom indicates.

[3]The College maintains that discrimination on the basis of race or sex is morally repugnant to its principles, a belief it has held voluntarily long before the advent of the federal nondiscrimination laws. In addition, its admissions practices and treatment of students are presently regulated by Pennsylvania law. *See* 17 *Pa. Cons. Stat. Ann.* § 5001 *et seq.* (Purdon 1981).

[4]Unless the context demands greater specificity, both HEW and its successor, the Department of Education, will be referred to as "the Department." In the interests of consistency, the regulations at issue will be cited as 45 C.F.R. The regulations' section numbers remain the same, however, whether codified at 34 or 45 C.F.R.

[5]Now required by 34 C.F.R. §106.4

The College told the Department that, as a matter of principle, it had consistently refused to accept assistance from the government and that it did not operate any programs or activities which received federal financial assistance. In addition, the College emphasized that it did not discriminate and did not intend to do so. Therefore the College stated that it would not execute the Assurance, especially since the Assurance by its terms imposed institution-wide regulation over all the College's activities.

The Department contended that executing the Assurance was necessary because a number of the College's students received Basic Educational Opportunity Grants (BEOGs)[6] or Guaranteed Student Loans (GSLs).[7] Despite the fact that the assistance was paid by the government or private lenders directly to the students, the Department maintained that funds from these sources might be paid eventually to the College.[8] Thus, alleged the Department, the College was a "recipient" of federal financial assistance as that term was defined in 45 C.F.R. 86.2(h), and, therefore, was subject to all of the Department's Title IX regulations. Faced with the College's refusal to sign the Assurance, the Department began proceedings to

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[6]20 U.S.C. §1070a.

[7]20 U.S.C. §§ 1071 *et seq.*

[8]The College's sole function with respect to the BEOG and GSL programs is to state its educational costs and to certify that the students applying for such aid are matriculating at the College. The grants and loans are made directly to the students by the government or private lending institutions which exercise complete control over the selection process. The College has neither control over, nor knowledge of, the use of the funds under either program. The funds are not required to be used to pay College charges, but may be used for any educational purpose. This broad condition, for example, allows the student to spend BEOG funds with private vendors for

Footnote continued on next page—

declare the College, and thereby its students, ineligible to receive GSLs and BEOGs.[9]

Following a hearing, an HEW Administrative Law Judge found that the College was not in compliance with the Title IX regulations solely because it refused to execute the Assurance. Concluding that he had no power to change the regulations, the ALJ therefore held that students attending the College were ineligible to receive BEOGs or GSLs and ordered termination of their grants and loans. In *re Grove City College*, docket No. A-22 (September 15, 1978). (A 89). Significantly, the Administrative Law Judge also found that:

> There was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX. This refusal is obviously a matter of conscience and belief. (A 94).

The Administrative Law Judge's order became final on October 14, 1978 (45 C.F.R. §81.104). On November 29, 1978, the College and several of its students commenced suit in the United States District Court for the Western District of Penn-

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—*Footnote continued from preceding page*

books, off-campus housing, travel, child care, and miscellaneous personal expenses. See 34 C.F.R. § 690.51 (1981). The implication that BEOG funds automatically flow undiverted from the federal treasury to the College must therefore be rejected. The College has chosen not to accept students who wish to participate in other federally funded student assistance programs where the federal monies are given to the institution as a fund. In these programs, the institution selects eligible recipients and determines the amount of grants or loans. See BEOG (Regular Disbursement System), 34 C.F.R. §§ 690.71-690.85; Supplemental Educational Opportunity Grant Program, 34 C.F.R. Part 676; National Direct Student Loan Program, 34 C.F.R. Part 674; College Work-Study program, 34 C.F.R. Part 675.

[9]In the administrative proceedings, only the College was named as a respondent.

sylvania seeking judicial review of the administrative determination pursuant to 20 U.S.C. §1682 and 5 U.S.C. §701 *et seq.* In an amended opinion on June 26, 1980 (A 45; 500 F.Supp. 253), the district court granted plaintiffs' motion for summary judgment, holding that the Department could not terminate federal assistance to Grove City students because the College refused to sign the Assurance of Compliance.

Although the district court accepted the Department's argument that BEOGs and GSLs constituted "Federal financial assistance" within the meaning of Title IX, it nonetheless upheld the College's position in other respects. First, the court held that the Department could not terminate GSLs because Section 902 of Title IX (20 U.S.C. §1682) precludes any Title IX enforcement authority with respect to "a contract of insurance or guarantee". (A 105). Second, the district court held that the College was not required to sign the Assurance of Compliance because it required agreement with invalid regulations, as Subpart E of the Department's regulations had then been held to be invalid by a number of courts. (A 76-77). Alternatively, the district court held that termination of assistance to students based solely upon the College's refusal to sign the Assurance of Compliance was unlawful because Section 902 of Title IX permitted termination only upon an actual finding of sex discrimination. (A 79-84). Finally, the district court held that termination was impermissible absent a due process hearing for the students. (A 78-79).

The Department appealed from the district court's decision, and thereafter, the College cross-appealed from one part of the decision. The Department appealed the failure of the district court to uphold termination of assistance to the College's students.[10] The College argued that the district court erred in

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[10]During the appeal the Department withdrew its claim that GSLs are not within the exclusion of Section 902 for contracts of insurance or guaranty. Termination of GSLs to the College's students is therefore not at issue in this petition. *See* A 9, n.10.

finding it to be a recipient of Federal financial assistance within the meaning of Title IX.

In an opinion dated August 12, 1982, the Court of Appeals for the Third Circuit upheld the District Court on the recipient issue and reversed it in all other respects. Relying substantially on post-enactment legislative history, the Court of Appeals held that receipt by students of BEOGs rendered the College subject to Title IX as a "recipient" of Federal financial assistance. (A 10-20). Moreover, in answering the College's argument that upholding Title IX jurisdiction was incompatible with the explicit program-specific limitation contained in Title IX, the Court of Appeals, contrary to numerous other courts, held that the receipt by students of federal grants rendered the entire College subject to Title IX regulation. In doing so, the Circuit Court specifically held that "program or activity" as that phrase is used in Title IX encompassed the entire educational institution. (A 23-31). The Court of Appeals additionally held that the Department may lawfully terminate assistance to students solely because the College refused to sign an Assurance of Compliance, notwithstanding lack of any discrimination. (A 34-37). Finally, it held that no individual due process hearings were necessary before terminating assistance to students. (A 38-39).

REASONS FOR GRANTING THE PETITION

A. *The Decision of the Court Below Conflicts With Applicable Decisions of This Court and With Decisions of Other Courts of Appeal Interpreting Title IX of the Education Amendments of 1972.*

This case presents a simple issue: Did Congress intend to subject to institution-wide Title IX regulation an independent college which refuses any Federal assistance, but which enrolls students who receive Basic Educational Opportunity Grants

directly from the government without any selection or intervention by the college? The Third Circuit answered in the affirmative, holding that, "Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." (A 31). Accordingly, when any of its students receives BEOGs, the entire institution is subject to Title IX regulation. Furthermore, said the Third Circuit, a college's failure to acknowledge that it is subject to such regulation requires termination of all federal aid to students. The Third Circuit holding is contrary to this Court's decision in *North Haven Board of Education v. Bell*, ___ U.S. ___, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), (hereafter "North Haven"), as well as with decisions in the other Courts of Appeals.

Section 901(a) of Title IX states in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. §1681(a).

Section 902 of Title IX specifies the remedy for violation of Section 901's non-discrimination requirement in the same program-specific terms. Any violation of Title IX requires termination of assistance to the "program or part thereof" found to be discriminatory. 20 U.S.C. §1682. By this clear programmatic language, Congress mandated that receipt of federal assistance be denied if the educational institution operating a program or activity discriminates in the program or activity receiving federal assistance. As a condition precedent to becoming a covered recipient of "Federal financial assistance," however, the institution must operate an "education program or activity" which receives the assistance. *Receipt* is the statutory touchstone. A fair reading of the statute

indicates that it is not enough that the educational institution incidentally benefits from its *students'* receipt of federal aid. Benefit does not equal receipt.

As its conscious use of this program-specific language in Sections 901 and 902 demonstrates, Congress did not intend that a college which does not operate any program or activity receiving Federal financial assistance, and whose only connection to federal aid is its admission of students who receive federal grants, would be subject to Title IX regulation. Despite the College's principled refusal of any federal funding, however, the Court of Appeals concluded that all the College's programs and activities were subject to Title IX solely because some of its students participate in student aid programs.[11] In finding that the entire operation of the College constituted its "program," the Third Circuit misinterpreted the program-specific thrust of Title IX, as stated in this Court's opinion in *North Haven*.

In North Haven, this Court held that the Department has jurisdiction under Title IX to consider compiaints of employment discrimination in programs or activities receiving Federal financial assistance. In doing so, however, this Court rejected the Second Circuit's assertion that the regulatory authority of the Department was institution-wide. The Second Circuit had stated that the program-specific restriction on the termination power was not a restriction on the Department's overall

[11]The Third Circuit found it necessary to reach this conclusion once it determined that the direct grants to students brought the College within the jurisdiction of Title IX. At that point, the Court believed that the only way to comply with Title IX's program-specific command was to hold the entire educational institution to be a "program." *See* A 31. The incompatibility of this holding with *North Haven's* program-specificity holding underscores that in the case of student assistance programs where the institution itself has no involvement or control in the selection of recipients or the amount of their grants (ie, the BEOG alternate disbursement system), Congress did not intend that Title IX regulation would apply. *See* Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,'" 78 *Mich. L. Rev.* 608 (1980).

regulatory power, which the Second Circuit held could be exercised in an institution-wide manner. *See* 629 F.2d at 785. Overturning the Second Circuit's holding, this Court noted that Congress had rejected an institutional approach in favor of a prohibition against discrimination in programs receiving assistance. 102 S.Ct. at 1926. It then concluded:

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§901 and 902. (20 U.S.C. §§1681, 1682). *Id.*

The Third Circuit disregarded this holding of *North Haven* and held instead that any federal aid to students attending an educational institution would subject the whole institution to Title IX regulation. (A 31). The Third Circuit attempted to reconcile its decision with *North Haven* on the basis that *North Haven* had implicitly adopted an institutional approach to Title IX regulation. (A 24). This Court in *North Haven* did leave to a later case the precise meaning of the word "program", 102 S.Ct. at 1927, but unambiguously commanded that Title IX be interpreted by the Department only in a program-specific manner. The Court condemned the institution-wide approach which the Second Circuit would have permitted, and which the Third Circuit has now adopted. *See* 102 S.Ct. at 1926.

On the specific issue of the effect of student assistance programs, the Third Circuit holding in this case conflicts with other courts of appeal and numerous district courts. It is now also regarded by the Department itself as erroneous.

In *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1976, 72 L.Ed.2d 444 (1981), a student brought suit under Section 901 of Title IX claiming sex discrimination in grading practices at Harvard Law School. The only federal aid program alleged to exist at Harvard was a student work/study program. Plaintiff argued that Harvard's "receipt" of federal funds

through participation in the work/study program opened its grading practices to challenge under Title IX. Equating assistance to the work/study "program" with assistance to the entire educational institution was crucial to Plaintiff's argument.

Unlike the Third Circuit in this case, the First Circuit rejected this equation. Initially, the First Circuit noted that although "education program or activity" is not defined in Title IX, "educational institution" is, thus leading to the conclusion that the two are not the same. 663 F.2d at 338. It then noted that Senator Bayh's initial Title IX proposal was institution-wide in scope, but that Congress rejected that approach in favor of the programmatic approach. 663 F.2d at 338-39, n.1. Plaintiff did not claim discrimination in the work/study program, where Title IX was properly applicable. The *Rice* court therefore concluded that the claim that Title IX was applicable to Harvard's grading practices could not be upheld.

Thus, the First Circuit conflicts with the Third Circuit's conclusion that "program or activity" should be given an institutional interpretation. The Third Circuit recognized this conflict but explicitly refused to follow *Rice*. (A 30, n.27.)

The Third Circuit in this case also rejected the reasoning and holding of *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D. Va. 1982). The direct conflict between the Third Circuit and the district court in *Richmond* merits this Court's attention. The Department has refused to appeal the *Richmond* decision, concluding that the District Court's decision was "analytically and legally sound", even read in light of the Third Circuit decision in this case. *See* Letter of Assistant Attorney General Reynolds to Clarence Pendleton, Jr., September 16, 1982. (A 134).

Richmond considered whether the Department could investigate compliance in the University's athletic program where

the only types of federal assistance involved were general student assistance programs[12] and a $1,900 library grant. Following the approach ratified by the Third Circuit in *Grove City*, the Department maintained that the University had "received", either directly or indirectly, "Federal financial assistance" which benefited its programs or activities. *See* 543 F.Supp. at 323-4, n.5.[13] Completely rejecting this approach, the district court held the Department was engaged in an *ultra vires* attempt to legislate the institutional approach to Title IX regulation which Congress had rejected:

> In essence, the [Education Department's] "benefits" and "infection" theories are but theories, or arguments, that Congress should not have rejected the initial institutional approach introduced by Senator Bayh. However, Congress did reject that approach and that should have been the end of it. 543 F.Supp. at 330.

The *Richmond* court similarly rejected the Department's interpretation of assistance to students as the equivalent of assistance to the institution. 543 F.Supp. at 330. The Third Circuit specifically equated the two, upholding the Department's regulation [45 C.F.R. 86.2(g)(1)(ii).] (A 15). In contrast, the *Richmond* court likened the relationship between student assistance and the education institution's receipt of tuition as a fee for services rendered, stating:

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[12]These included National Direct Student Loans, Supplemental Educational Opportunity Grants, the College Work/Study Programs, and BEOGs. See 543 F.Supp. at 323.

[13]The assertion of an identical position by the Department is what led Grove City College to refuse to sign the Assurance of Compliance, since to do so would have conceded institution-wide coverage of all of its programs or activities, despite the fact that it did not itself receive any assistance. *See* the Department's fact sheet accompanying the Title IX regulations, which unequivocably state this position:

Footnote continued on next page—

> The Court simply will not countenance the [Education Department's] attempt to bootstrap itself through its regulations to make, by necessary implication, all programs and activities of a private university subject to its control when . . . students themselves receive what it determines to be "Federal Financial assistance." 543 F.Supp. at 330-31.

The government has recognized the conflict between *Grove City* and *Richmond* and has concluded that *Richmond* represents the correct analysis of Title IX, and thus, should not be appealed. (A 136).

There is another case awaiting decision in the Sixth Circuit Court of Appeals which also involves the application of Title IX to student assistance programs. *Hillsdale College v. Department of Education, et al.*, No. 80-3207 (argued December 7, 1981). As in *Grove City*, the Department in *Hillsdale* ordered termination of direct assistance to Hillsdale students because Hillsdale refused to sign an Assurance of Compliance, despite the fact that Hillsdale itself received no federal aid. Hillsdale petitioned directly to the Circuit Court for review of the Department's action. The Sixth Circuit is the same Circuit which decided *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979), in which the

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—*Footnote continued from preceding page*

> [T]he final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs.

HEW Fact Sheet Accompanying the Final Title IX Regulations (1975). *Accord, Sex Discrimination Regulations: Hearings before the Subcomm. on Post-Secondary Education of the Comm. on Education and Labor, House of Representatives, 94th Cong., First Sess. (1975)*, at 438 (hereinafter *"Sex Discrimination Hearings"*) (testimony of HEW Secretary Weinberger); Letter of HEW Secretary Weinberger to Hon. James G. O'Hara, Chairman, House Subcommittee on Post-secondary Education, July 2, 1975, reprinted in *Sex Discrimination Hearings*, at 488.

court of appeals outlined the program-specific limitations of Title IX:

> The concern of this particular statute (Title IX) is not with all discrimination against persons in any way connected with educational institutions which receive federal funding. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance . . . ." Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by §1681.

600 F.2d at 584. Although *Romeo's* holding regarding Subpart E of the Title IX regulations is no longer valid in light of *North Haven*, this Court in *North Haven* fully endorsed the *Romeo* language quoted above. The Sixth Circuit is therefore likely to reconfirm its belief that Title IX is program specific.[14]

The Third Circuit's construction of "program or activity" also conflicts with the Fifth Circuit's interpretation of identical programmatic language under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Compare A 31 with *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969) (hereafter *"Finch"*). At issue in *Finch* was the Department's attempted termination of all federal assistance to an entire school district without regard to the program-specific termination provisions of Title VI. The Department argued in *Finch* that the term "program" as used in Title VI was meant to encompass an entire school program. Relying on the legislative history of Title VI, the *Finch* court rejected this broad interpretation and held instead that the individual grant statutes at issue constituted the "program or activity" as that phrase is used in Title VI. Title IX, whose

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[14]The Third Circuit expressed the opinion that neither *Romeo* nor the related line of cases which considered the Department's Subpart E employment regulations had any validity after *North Haven* and expressly refused to follow their program-specificity analysis. A 30, at n. 27.

programmatic language is identical to that in Title VI, was modeled on that statute. *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979). The Third Circuit rejected the more limited definition of program set out in *Finch*, despite the fact that *Finch* was cited approvingly in *North Haven*. *See* 102 S.Ct. at 1926.

Numerous other district courts similarly disagree with the Third Circuit's endorsement of the institutional approach to Title IX regulation. *See, Bennett et al. v. West Texas State University*, 525 F.Supp. 77 (N.D. Tex. 1981), *appeal pending*, No. 81-1398 (5th Cir.) (No Title IX jurisdiction over athletics program not receiving federal financial assistance.); *Othen v. Ann Arbor School Board*, 507 F.Supp. 1376 (E.D. Mich. 1981), *appeal pending*, No. 81-1259 (6th Cir.) (No Title IX jurisdiction over athletics program not receiving federal financial assistance).

B. *This Case Raises Significant Constitutional and Statutory Questions Concerning the Government's Power to Regulate the Affairs of Independent Colleges.*

This case raises substantial issues regarding the scope of government authority under Title IX. It is important not only to educational institutions like the College, which have steadfastly refused any Federal financial assistance, but to virtually every educational institution in the United States. It also raises significant questions about the limitations on First Amendment rights of association and academic freedom to which the College and its students are entitled.[15]

In the hundreds of independent colleges and universities which exist in this country, diversity has long been an acknowledged strength. Each institution solves problems in its

---

[15] *Cf.* Note, "Academic Freedom and Federal Regulation of University Hiring," 92 *Harv. L. Rev.* 879, 891-897 (1979)

own manner, each is a center of innovation and experiment, and each has its own commitment to cultural, educational, and moral values. This diversity itself is so important that it is recognized as meriting constitutional protection. *See University of California Regents v. Bakke*, 438 U.S. 265, 311-315 (1978) (Powell, J.). The necessity of preserving this valued diversity has been also long recognized by Congress. Representative Green, the house sponsor of Title IX, stated during the debates on Title IX:

> I think we ought to respect the autonomy of the institution and let the institutions determine their priorities and needs. The Federal government has no business saying that if you do not do what we have decided is important — you do not get any funds. I say if we follow this course, we will have more and more Federal control, which is what I want to avoid.

117 Cong. Rec. 37785 (1971). Representative Green's comment underscores the Congressional philosophy which has guided aid to American higher education. Congress feared that general assistance would result in control. Remembering the adage that he who pays the piper calls the tune, historically Congress has aided higher education either through programmatic grants and loans, or through direct assistance to students who can then exercise their freedom to choose the educational institution most suitable to them.

Title IX's program-specific limitation must be understood in the foregoing context; regulation is permissible in those programs receiving federal aid, but is impermissible where a program receives no assistance.[16] Congress did not intend that assistance given directly to students without intervention or selection by the educational institution would subject the entire institution to control. Because student assistance programs are so widespread, to find otherwise would nullify Title IX's

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[16]This would not preclude termination of assistance where discrimination in a non-funded program "infects" a funded program. *See Finch*, 414 F.2d at 1078; *Richmond*, 543 F.Supp. at 329-330; *Rice*, 663 F.2d at 339, n.2.

program-specific directive for virtually every educational institution in the country.

The Third Circuit's expansive institutional approach already has been applied in several cases arising either under Title IX or under other statutes with the same programmatic language.

In *Haffer v. Temple University*, 524 F.Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982), *pet. for cert. pending*, another panel of the Third Circuit considered whether Title IX should be applied to an athletics program which itself received no Federal financial assistance. Holding itself bound by the decision in *Grove City College*, the *Haffer* court held that the receipt by some Temple students of BEOG funds subjected all Temple's programs and activities, including the athletics program at issue, to Title IX regulation.

In *Le Strange v. Consolidated Rail Corporation*, No. 81-2943 (3d Cir. September 1, 1982), the Court of Appeals held that Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) applied to employment practices. Concurring in the judgment, Circuit Judge Adams stated that the decision in *Grove City* compelled a conclusion that employment practices were covered under Section 504 even if federal funds were not slated for employment purposes. *See also, Pittsburgh Federation of Teachers, Local 400 v. Langer*, No. 81-1546 (W.D. Pa. August 31, 1982) (entire operation of school district may be "program" for purposes of Section 504).[17]

---

[17]These decisions in the Third Circuit illustrate the conflicting approaches taken by other courts examining indirect assistance in the context of program-specific statutory language. *See Disabled in Action v. Mayor and City Council of Baltimore*, No. 81-1846/1896 (4th Cir. August 9, 1982) (Baseball club which leases city-owned stadium receiving federal financial assistance is not a "recipient" itself under Section 504 of the Rehabilitation Act of 1973, despite the fact that it enjoys indirectly the benefits of federal assistance to the stadium); *Angel v. Pan American World Airways*, 519 F. Supp. 1173 (D.D.C. 1981) (Despite fact that airline was beneficiary of federal financial assistance to airport, it was not a program or activity receiving federal assistance under Section 504).

Uncertainty as to the meaning of Title IX's program-specificity language, therefore, requires that this Court eliminate the inconsistencies among the courts of appeals and clarify the intended scope of permissible regulation under Title IX.

C. *It is Fundamentally Unfair to Permit the Government to Subject Colleges in the Third Circuit to a Different Rule of Law From That Prevailing in Other Circuits.*

The government has stated that it believes the rule of law adopted by the Third Circuit in this case is wrong. In a letter explaining why the government had decided not to appeal the *Richmond* decision, Mr. William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division, explained that the government no longer supported the expansive reading it had once advocated in *Richmond* and *Grove City College:*

> "The position advanced by the then director of DOEd's Office of Civil Rights . . . was that receipt by Richmond students by even a single dollar of federal funds is sufficient to subject all of the University's programs and activities to Title IX scrutiny — even those programs and activities that receive no federal funds . . . ."
>
> In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found [the Richmond opinion] to be both analytically and legally sound. Its conclusion that only those university programs and activities shown to be recipients of federal funds are within the reach of Title IX is fully consistent with the better reasoned judicial precedents in the area. See *Rice v. President and Fellows of Harvard College,* 663 F.2d 336 (1st Cir. 1981); *Bennett v. West Texas State University,* No. 280-0073-f (N.B. Tex., July 27, 1981); *Othen v. Ann Arbor School Board,* 507 F.Supp. 1376 (E.D. Mich. 1981). (A 135-136)."

After acknowledging that the Third Circuit in *Grove City* had adopted the position previously urged by the government, Assistant Attorney General Reynolds indicated that it was now the government's view that Congress had not intended so expansive an interpretation of "program or activity". (A 136).

Thus, the government will no longer contend that an entire academic institution is subject to Title IX simply because some of its students receive BEOGs. Refusing to grant this petition and thereby leaving intact the Third Circuit's judgment will create a fundamentally unfair result. Colleges in the Third Circuit that enroll students who receive BEOGs will be subject to institution-wide Title IX coverage while colleges in other circuits will not be. Such a result is intolerable.

To avoid such arbitrary injustice, this Court should grant the petition and set the case for argument.

CONCLUSION

What the Third Circuit endorsed in this case essentially turns the pertinent Statute upside down. The obvious and stated purpose of Section 901(a), 20 U.S.C. §1681(a), is to outlaw sex discrimination in "any education program or activity receiving Federal financial assistance." Yet the undeniable effect of the Court of Appeals' decision is to terminate assistance without regard to whether such discrimination exists or has ever existed.

Grove City College has not discriminated, yet students who attend the College will be prevented from participating in aid programs designed especially for them. This situation is one which deserves review by this Court. It is therefore respectfully urged that this Court grant the petition.

Dated: November 9, 1982

Respectfully submitted,

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CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

APPENDIX ACCOMPANYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2383

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Appellant

v.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Appellee

No. 80-2384

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Appellees

v.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Appellant

Opinion of the Court of Appeals,
August 12, 1982

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(Civil Action No. 78-1293)

Argued June 21, 1982
Before: GARTH, BECKER, *Circuit Judges*
and MUIR, *District Judge**
(Opinion Filed August 12, 1982)

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*Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

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Opinion of the Court of Appeals,
August 12, 1982

OPINION OF THE COURT

GARTH, *Circuit Judge*.

This appeal involves the Department of Education's authority to enforce Title IX of the Education Amendments of 1972,[1] against a college which receives no direct funds from the federal government, but whose students receive federal grants. The district court granted Grove City College's motion for summary judgment and refused to permit the termination of Basic Educational Opportunity Grants to students at the College, holding that the Title IX enforcement regulations were invalid. We reverse.

I.

A.

Title IX proscribes gender discrimination in education programs and activities receiving federal financial assistance. Title IX "contains two core provisions." *North Haven Bd. of Educ. v. Bell*, 50 U.S.L.W. 4501 (1982). Section 90(a) of the 1972 Act contains a program-specific ban of sex discrimination:

> No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity receiving Federal financial assistance*. . . .

20 U.S.C. §1681 (emphasis added).

Under section 902, each agency awarding federal financial assistance "other than a contract of insurance or guaranty" to any education program or activity is authorized to promulgate regulations to insure compliance with section 901(a). If

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[1] Pub. L. No. 92-318, §§901-07, 86 Stat. 373-75.

compliance cannot be secured by voluntary means, section 902 authorizes the termination of federal funds to the program in which noncompliance is found. 20 U.S.C. §1682.[2]

The Department of Education is the primary administrator of federal financial assistance to education.[3] Pursuant to its

---

[2]Section 902 provides in relevant part:

> Each Federal department and agency which is empowered to extend financial assistance to any education program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [901(a)] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

---

[3]Originally the Department of Health, Education and Welfare had primary responsibility for administering federal assistance to education. This action was brought against the Department of Health, Education and Welfare, since it had issued the administrative order under Title IX terminating assistance to students attending Grove. Subsequently, when the Department of Education was established to take over the education functions of HEW, Title IX enforcement authority was transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. The Secretary and Department of Education were substituted as defendants in this action by order of the Clerk of this Court.

Unless further specificity is demanded by the context, the defendants, including the Department of Health, Education and Welfare and any successor will be referred to as "the Department."

regulations, 34 C.F.R. §106.4(a), the Department requires each recipient of federal aid to file an Assurance of Compliance as a means of securing adherence to Title IX.[4] Under the Assurance in use at the time of this case was filed, the recipient agreed that it would

> [c]omply, to the extent applicable to it, with Title IX . . . and all requirements imposed by . . . the Department's regulation . . . the end that, in accordance with Title IX . . . no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any education programs or activity for which the Applicant receives or benefits from federal financial assistance. . . .[5]

In addition recipients provided basic information about their programs, including a "self-evaluation" under Title IX (A. 18).

---

[4] 34 C.F.R. §106.4(a) provides in relevant part:

> Every application for Federal financial assistance for any education program or activity shall as [a] condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

[5] The Assurance of Compliance currently in use provides that the applicant "will comply with . . . Title IX . . . which prohibits discrimination on the basis of sex in education programs and activities receiving federal financial assistance."

B.

Grove City College (Grove) is a private co-educational institution of higher education affiliated with the United Presbyterian Church and located in Grove City, Pennsylvania. Approximately 2,200 students attend Grove (A. 33). One hundred forty of Grove's students are eligible to receive Basic Educational Opportunity Grants (BEOGs) appropriated by Congress and allocated by the Department pursuant to 20 U.S.C. §1070a. Three hundred forty-two of Grove's current students have obtained Guaranteed Student Loans (GSLs).[6] Other than through the BEOG or GSL programs, Grove receives no federal or state financial assistance.[7]

BEOGs are paid by the Department directly to the eligible students attending Grove. Grove, however, executes the institutional section to the students' BEOG applications and certifies data involving the student applicants' costs and enrollment status so that the students might receive federal financial assistance.[8]

---

[6]Under the student loan program, a GSL is provided by a private lending institution which lends funds directly to the student. The GSLs are guaranteed by the Commonwealth of Pennsylvania. In turn, the United States, guarantees 80% of the Commonwealth's obligation. The federal government pays interest subsidies on these loans. 20 U.S.C. §1077.

[7]In its brief, Grove has explained its policy in refusing refunds:

> Since its founding in 1876, the College, as an integral part of its philosophy, steadfastly refused any form of government funding. . . .
>
> . . .The College also informed HEW that it has always refused to accept financial assistance from any governmental source since to do so would compromise its independence.

Brief for Appellants, No. 80-2383, at p. 3-4.

[8]There are two methods of disbursement of BEOGs. Under the Regular Disbursement System, the Department advances the funds to the educational institution, which then either pays the student by check or credits the grant against the student's account. 34 C.F.R. §§690.71, 690.78. Under the Alternative Disbursements System, the grants are mailed directly to the students after the institution makes the appropriate certification. 34 C.F.R. 690.91. Grove's participation in the BEOG program involves the latter method of alternative disbursement.

In July, 1976 the Department began efforts to secure an Assurance of Compliance from Grove based upon the receipt of BEOGs and GSLs by Grove students. Grove refused to execute the Assurance, asserting that it received no federal financial assistance. The Department then initiated administrative proceedings to terminate grants and loans to students attending Grove.

After an administrative hearing, an Administrative Law Judge (ALJ) concluded that Grove was a recipient of federal financial assistance within the meaning of Title IX and that the allocation of BEOG's and GSL's could be terminated for Grove's refusal to execute an Assurance of Compliance. Since Grove conceded that it did not file an Assurance of Compliance, the ALJ entered an order prohibiting the payment of BEOG's or GSL's to students attending Grove.

C.

On November 29, 1978, Grove, joined by four student BEOG and GSL recipients,[9] commenced this suit. The plaintiffs sought an order which would declare void the Department's termination of BEOG and GSL assistance. Additionally, they sought to enjoin the Department from requiring Grove to file an Assurance of Compliance as a condition of preserving its eligibility in the BEOG and GSL programs. Finally, the complaint sought a declaration that the anti-sex discrimination regulations promulgated by the Department went beyond the authority contained in Title IX, or alter-

[9]According to their affidavits, for academic year 1978-79, student plaintiff Marianne Sickafuse received a BEOG totaling $408, Kenneth Kockenberry received a BEOG totaling $654 and a GSL totaling $2,000, Jenifer Smith received a GSL for $1,000, and Victor Vouga received a GSL totaling $2,500 (A. 58, 76, 95, 97). In affidavits, the student plaintiffs each represented that without these funds "I will be unable to continue in attendance at [Grove City College] the college of my choice" (A. 59, 77, 96, 99).

natively, that those regulations were unconstitutional as applied to Grove. Cross-motions for summary judgment were filed on the basis of affidavits and the administrative record (A. 30, 101).

D.

In an amended opinion on June 26, 1980 the district court granted Grove's motion for summary judgment and denied the cross-motion of the Department. Although the Court agreed with the Department that BEOGs and GSLs constituted "federal financial assistance" to Grove within the meaning of Title IX, it concluded that the Department could not terminate federal assistance to Grove City students because of Grove's refusal to sign an Assurance of Compliance.

The district court set forth several alternative rationales for its conclusions. First, the court held that 20 U.S.C. §1682, which denies Title IX enforcement authority with respect to "a contract of insurance or guarantee," precluded the Department from terminating GSLs.[10] Second, the court concluded that the Department could not require Grove to sign an Assurance of Compliance since subpart E of the Department's regulations which prohibit discrimination in employment was held to be invalid. Alternatively, the court held that the Department had unlawfully terminated Grove's federal financial assistance based solely upon Grove's refusal to sign the Assurance. The court concluded that such a termination is authorized by Title IX only upon an actual finding of sex discrimination (A. 134-38), a finding which the Department had not made. Finally, the

[10] In the district court, the Department claimed that the furnishing of GSLs, as well as BEOGs, made Grove a recipient of federal financial assistance so that it became subject to Title IX. As noted in text, the district court held that GSLs were contracts of guarantee within the exception to section 902(a). On appeal the Department does not contest the district court's conclusion. Brief for the Department at 2 n.2. Thus, the issue of GSLs is not presented on this appeal.

court held that the Department was barred by the due process clause of the fifth amendment from terminating the BEOGs without first affording hearings to all students who would be adversely affected (A. 132-133).

The court's final amended order (1) declared that the Assurance of Compliance form (HEW Form 639A) was invalid; (2) enjoined the Department from using the Assurance of Compliance form; (3) enjoined the termination of financial assistance to the plaintiffs unless actual sex discrimination was proved at an administrative hearing with notice to all those affected by the proceeding; and (4) enjoined the termination of GSL's to students.

The Department's appeal, No. 80-2384, and Grove's cross-appeal, No. 80-2383 followed.[11]

II.

At the outset, we consider Grove's cross-appeal because a threshold question on this appeal is whether Grove, which has refused all federal financial assistance, nevertheless is to be considered a recipient of such assistance within the meaning of section 901(a) because its students receive federal grants.

The Department has construed the phrase "federal financial assistance" to include educational grants paid to students, and, thus, received indirectly by the schools which they attend. The regulation defines federal financial assistance in relevant part as

> (1) A grant or loan of Federal financial assistance, including funds made available for:
>
> * * *
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, *or extended directly to such students for payment to that entity.*

[11]Grove's cross-appeal was filed to preserve its contention that the mere acceptance of BEOGs by Grove's students did not bring Grove within Title IX, as a recipient of federal financial assistance.

34 C.F.R. §106.2(g)(1)(ii).

The Department's regulations further define a "recipient" of federal financial assistance:

> (h) *"Recipient"* means . . . any person, to whom Federal financial assistance is extended directly *or through another recipient and which operates an education program or activity which receives or benefits from such assistance,* including any subunit, successor, assignee, or transferee thereof.

30 C.F.R. §106.2(h)

Thus, the Department maintains that Grove is a "recipient" because students attending Grove receive federal monies in the form of BEOGs which monies are used to pay their educational expenses at Grove.

Grove challenges the Department's inclusion of BEOGs within the scope of "federal financial assistance" under section 901(a). According to Grove, the phrase "federal financial assistance" refers only to direct payments to institutions or educational programs, and, thus, does not include educational grants paid to students when the educational institution involved plays no role in choosing the beneficiaries or designating amounts of aid. Answering Brief for Appellants at 7, n.6. Since BEOGs are paid to students based on eligibility requirements determined by the federal government, Grove contends Title IX is not implicated.

A.

In determining the scope of Title IX, we begin with the statutory language itself. *North Haven Board of Education v. Bell,* 50 U.S.L.W. 4501 (1982). The language of section 901(a) extends Title IX's coverage to "any education program or activity receiving Federal financial assistance. . . ." Hence, by its all inclusive terminology the statute appears to encompas *all* forms of federal aid to education, direct or indirect.

Grove, however, argues that the statute has no application to it. Section 901, argues Grove, applies to "any . . . program or activity receiving federal financial assistance," and it must be conceded, contends Grove, that it "receives" no such assistance. Although Grove acknowledges that it benefits from federal aid which its students receive, Grove claims that this is insufficient to bring Grove's activities within the ambit of Title IX. In effect, Grove reads the statute as pertaining only to direct aid and not to indirect assistance.

Giving Title IX the broad reading that its remedial purpose dictates, *see North Haven*, 50 U.S.L.W. at 4503, we cannot agree with the manner in which Grove interprets §901(a) or with its conclusion that §901(a) is limited solely to direct assistance.

B.

The enactment of Title IX in 1972 was the culmination of efforts over several years to ban gender discrimination in the field of education. Patterned after Title VI of the Civil Rights Act of 1964, which proscribes discrimination by reason of race, color, religion, or national origin, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979).[12] Indeed, the legislative history reveals that Title IX was designed to fill the gap left by Title VI of the Civil Rights Act of 1964, which did not prohibit discrimination based on sex. *See, e.g.*, 118 Cong. Rec. 5807 (1972) (Remarks of Senator Bayh).

---

[12]Title VI provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d.

In addition, the provision authorizing administrative enforcement of Title IX through termination or refusal of federal aid is virtually identical to the administrative enforcement provisions found in Title VI. *Compare* 20 U.S.C. §1682 (Title IX) *with* 42 U.S.C. §2000d-1 (Title VI).

Just as Title VI was structured so that federal monies would not be expended in *any* fashion[13] which would subsidize racial discrimination,[14] so too, was the use of federal funds proscribed for the support of educational institutions that discriminated on the basis of sex.

Indeed, in *Cannon v. University of Chicago,* 441 U.S. 677, 704 (1978), the Supreme Court recognized that Title IX, like Title VI, was designed "to avoid the use of federal resources to support discriminatory practices. . . ." The legislative history of Title IX amply supports this conclusion.

C.

In 1971, the provisions embodying Title IX were first introduced by Senator Bayh as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971. A major feature of S. 659 was the establishment of the Basic Educational Opportunity Grant program. Speaking in support of the amendment, Senator Bayh stated:

---

[13]During the floor debates on the 1964 Civil Rights Act, Senator Humphrey stressed:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in *any* fashion which *encourages, entrenches, subsidizes, or results* in racial discrimination.

110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963) (emphasis added). *See also* 110 Cong. Rec. 7054-55 (1964) (remarks of Sen. Pastore).

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[14]The legislative history of Title VI clearly indicates that it was intended to cover indirect assistance programs, including educational programs. For example, Congressmen Poff and Cramer introduced a partial list of programs which would be embraced by Title VI. See H. R. Rep. No. 914 (1963) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer) *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2471-73. At least two of the programs on the list involve grants or awards to students. See 42 U.S.C. §242d(b) (1970) (repealed Pub. L. 94-484, §503(b)(1976) (graduate training for physicians, engineers, nurses and other professional personnel providing for grants to individuals or institutions); 20 U.S.C. §461-65 (graduate fellowships). *But see* Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 Mich. L. Rev. 608 (1980).

> The bill deals with equal access to education. Such access should not be denied because of poverty or sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education. . . .
>
> [i]t does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half our citizens.

117 Cong. Rec. 30412 (1971). The same sentiments were expressed in the House. 117 Cong. Rec. 39252 (1971)[15]

Statements made during the 1971 debates on Senator Bayh's proposal demonstrate that the funds subject to Title IX encompassed virtually all federal assistance to education, including BEOG grants to students. Supporting Senator Bayh's amendment to the Bill which provided for the establishment of the BEOG program, S. 659, Senator McGovern stated:

> I urge the passage of [Senator Bayh's] amendment to assure that *no* funds from S. 659, the Omnibus Education Amendments Act of 1971, be extended to any institution that practices biased admissions or educational policies.

117 Cong. Rec. 30,158-59 (1971) (emphasis added).

Similarly, when Senator Bayh was asked what type of aid might be subject to termination under Title IX, he responded, "We are cutting off *all* aid that comes through the Department of Health, Education and Welfare. . . ." 117 Cong. Rec. 30408 (1971).

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[15]The floor debates in the House and Senate, while meager, are still the most authoritative source of Title IX legislative history. *See* North Haven, 50 U.S.L.W. at 4504. In the Senate, Title IX was introduced as a floor amendment, so no Committee report discusses its provisions. By the same token, in the House, little insight was given by the Committee Report which accompanied H. R. 7248 (The Higher Education Act of 1971), a Bill which contained a prohibition of gender discrimination in federally funded education programs. *See* H. R. Rep. No. 554, 92 Cong. 1st Sess. (1971) *reprinted in* (1972 U.S. Code Cong. & Ad. News 2462, 2511-12. The differences between the House and Senate versions, none of which are relevant here, were resolved in the Conference on the Education Amendments of 1972. *See* S. Conf. Rep. No. 798, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2608.

Although Senator Bayh's 1971 amendment was not adopted, he reintroduced his amendment to S.659 on February 28, 1972 and the amendment was adopted that day. See 118 Cong. Rec. 5815 (1972).[16] It is that amendment that was ultimately enacted as Title IX, and which is involved in this appeal.[17] While it is true that the legislative history makes no explicit reference to "indirect" financial assistance such as student grants, the 1971 debates make it clear that Congress' overriding objective in enacting Title IX, that is, to withhold public funds from an institution which engages in sex discrimination, was to deny to discriminating institutions all such financial support, direct or otherwise. Thus, as we construe the legislative history it is consistent with the Department's position that Title IX applies to any institution which receives indirect or direct federal financial assistance. In light of Congress' intent which we have gleaned from the legislative history of Title IX, we are satisfied that monies which are paid to students, who in turn use those funds for their education, constitute no less a part of a college's revenues than federal monies paid directly to the institution itself.

This being so, the Department was well within its authority when it defined "recipient" to include any institution which receives federal financial assistance "through another recipient." 34 C.F.R. §106.2(h). Grove thus became a "recipient" within the regulations when it received federal monies that had been granted to its students for their use in educational pursuits.

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[16] In introducing the 1972 amendment, Senator Bayh stated that it provided a "comprehensive approach which incorporated . . . the key provisions of my earlier amendment. . . ." 118 Cong. Rec. 5808 (1972).

[17] Senator Bayh's 1971 amendment never came to a vote on the floor of the Senate because it was named nongermane to S.659. See 117 Cong. Rec. 30415 (1971).

Although there were some differences between Senator Bayh's 1971 proposal and his amendment that was actually adopted in 1972, these differences do not undermine our conclusion that the 1971 debates demonstrate that Title IX, as enacted, was intended to cover both direct and indirect financial aid.

D.

In addition to contemporaneous legislative history, the post-enactment history of Title IX provides further evidence that BEOGs come within the scope of "federal financial assistance."

After the Department published its final Title IX regulations on June 4, 1975, (40 Fed. Reg. 24128) they were submitted to Congress for review pursuant to §431(d)(1) of the General Education Provisions Act, Pub. L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. §1232(d)(1). This statutory provision affords Congress the opportunity to examine an agency regulation and, if it finds the regulation "inconsistent with the Act from which it derives its authority. . . ," Congress is enabled to disapprove the regulation by a concurrent resolution. If no such concurrent resolution is passed within 45 days of the submission of the regulation to Congress, the regulation becomes effective.

During the Congressional review of the Title IX regulations, the subject of indirect aid was specifically addressed. Legislators were explicitly informed by HEW Secretary Weinberger that the Department construed "federal financial assistance" to include indirect student assistance programs:

> Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.
>
> As Mr. Rhinelander [then HEW General Counsel] says the court case [*Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975)] confirms this belief.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on

Education and Labor, 94th Cong., 1st Sess. 481-484 (1975) ("Postsecondary hearings").

In response to this Departmental interpretation, Senator Helms introduced a proposed concurrent resolution that would have disapproved the regulation because it did not limit the application of Title IX to programs and activities directly receiving "federal financial assistance." *See* S. Con. R. 46, 121 Cong. Rec. 13300 (1975). In addition, several other proposed concurrent resolutions were introduced that would have disapproved the regulation in its entirety. *See* H.R. Con. Res. 310 (Rep. Martin) 121 Cong. Rec. 19209 (1975); H. Con. Res. 329 (Rep. O'Hara), 121 Cong. Rec. 21687 (1975); H.R. Con. Res. 330 (Rep. O'Hara), 121 Cong. Rec. 21687 (1975). No "disapproval" resolution was passed by either House.

Although Congress' failure to pass any of the concurrent resolutions does not definitively establish that it considered those regulations to be consistent with, and authorized by, Title IX, it does lend weight to the argument that coverage of BEOGs was intended, especially since the Department's construction of the phrase "federal financial assistance," was specifically brought to the attention of Congress.[18] The failure of Congress to pass a resolution disapproving the Department's "indirect aid" regulation is particularly significant, since Congress did not hesitate in amending §901 when it disagreed

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[18]Grove argues that we should accord no weight to Congress' failure to disapprove the Department's regulations. This argument rests on 20 U.S.C. §1232(d)(1) which provides, in part, that the failure of Congress to adopt a concurrent resolution disapproving a final regulation should not be construed as approval of the regulation.

However, that provision in 20 U.S.C. §1232(d)(1) was enacted approximately four months after the Department's regulations went into effect. *See* Pub. L. No. 94-142 §7(a)(1) (enacted November 29, 1975). Moreover, in its decision upholding subpart E of the Department's regulations, the Supreme Court concluded that the failure of Congress to pass disapproving resolutions was a factor to consider in interpreting section 901 of Title IX. *See North Haven*, 50 U.S.L.W. 4506-07 (1982).

with the Department respecting the scope of that section.[19] Indeed, Congress has declined to enact new legislation that was specifically designed to accomplish the result which Grove urges upon us. On the very day that the 45-day review period for the Department's regulation expired, Senator Helms introduced a bill that would have provided that "Title IX shall apply only to programs and activities which *directly* receive Federal financial assistance." S. 2146, 94th Cong., 1 Sess. (1975); *see* 121 Cong. Rec. 23845-23847 (1975) (emphasis added). Congress took no action on the Helms bill.

Subsequently, in 1976 Senator McClure proposed a similar amendment to Title IX that provided: "For purposes of this chapter, federal financial assistance received, means assistance received by the institution directly from the federal government." 122 Cong. Rec. 28144 (1976). In his statement in support of this proposal, Senator McClure made it apparent that had his amendment passed, Grove's interpretation of Title IX would undoubtedly be correct. Senator McClure stated:

> The particular abuse in this instance, the one that I am seeking to correct here . . . Hillsdale College, [is] subjected to Federal controls by way of student assistance or a GI grant to a student. Hillsdale College has gone to great pains to avoid any appearance of Federal support. They have not participated in Federal aid programs. They desire to be completely independent of the Federal taxpayer in the support of the institution. They are being subjected to Federal control because some student may have Federal assistance. My amendment would simply say that it has to be a direct Federal assistance before they are subjected to the HEW regulations at all.

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[19]Prior to the period of regulatory review, but after the Department had published its regulations for comment, Congress enacted legislation excepting social fraternities, sororities, and voluntary youth organizations from the reach of section 901. Pub. L. No. 93-568; §3(a), 88 Stat. 1862 (1974). In 1976, Congress enacted three additional exceptions to section 901's coverage. *See* Pub. L. No. 94-482, §412 (1976) (codified at 20 U.S.C. §1681(a)(7)-(9). (Boy or girl conferences, father-son or mother-daughter activities, and beauty pagent scholarship awards).

122 Cong. Rec. 28145 (1976).

These remarks brought forth an immediate and vigorous response from Senator Pell, the prime Senate sponsor of the educational opportunity grant programs included in the Education Amendments of 1972. Senator Pell declared:

> [T]he enactment of this amendment would mean that no funds under the basic grant program [i.e., the BEOG program] would be covered by Title IX.
>
> While these dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.

Id.

Similarly, Senator Bayh, the Senate sponsor of the language that was ultimately enacted as Title IX, vigorously announced his opposition to Senator McClure's amendment. The correct interpretation of Title IX, according to Senator Bayh, was the Department's construction that "federal financial assistance" included BEOGs, since student grants *benefited* the educational institution.

> The House committee studied this [Departmental] interpretation. I emphasized at that time that Title IX, which dealt with discrimination so far as women are concerned, is parallel in its language and enforcement expectations with Title VI of the Civil Rights Act. The courts have held that Title VI * * * does apply if a student received Federal aid. *If a student is benefited, the school is benefited.* It is not new law; it is tradition, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students.

122 Cong. Rec. 28145-28146 (1976) (emphasis added).

On that same day, soon after the remarks by Senators Pell and Bayh, Senator McClure's proposed amendment to Title IX was defeated by a 50 to 30 vote.

Although postenactment history is not always accorded controlling weight, *see Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979) (concluding that subsequent isolated statements by individual legislators or committee members "cannot substitute for a clear expression of legislative intent at the time of enactment"), here, where the Department's interpretation of "federal financial assistance" has been directly brought to Congress' attention, Congress' specific rejection of proposed legislation that would have overturned that interpretation provides a substantial indication that it was Congress' intent to include BEOG's within the coverage of section 901. Indeed, in *North Haven Bd. Of Educ.*, which upheld the Department's Title IX regulation governing employment discrimination, the Supreme Court relied, as we do here, on the post-enactment history of Title IX. In so doing, the Court stated:

> Although postenactment developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX . . ." Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."

50 U.S.L.W. at 4507 (citations omitted). *Accord, Cannon v. University of Chicago*, 441 U.S. 677, 687 n. 7 (1979).

E.

A case under Title VI which supports our conclusion that Grove is a recipient of federal aid within the meaning of Title IX, is *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

In *Bob Jones*, the Department had ordered that eligible veterans enrolled at Bob Jones University could not receive veterans' educational benefits because the University engaged in racially discriminatory practices. The University then sought injunctive relief from that order, arguing that, since the benefits were paid directly to veterans, it was not the University which received federal financial assistance, and, therefore, the University was not subject to Title VI. The district court rejected the University's argument and dismissed the injunction. It held that VA educational benefits, even though paid directly to students, constituted federal financial assistance to the University within the purview of Title VI.

The *Bob Jones* court based its reasoning on the broad remedial purpose of Title VI and the fact that the University benefited in two distinct ways from the payment made to student veterans. First, "payments to veterans . . . releas[e] institutional funds which would, in the absence of federal assistance, be spent on the student." 396 F. Supp. at 602. Second, "the participation of veterans who — but for the availability of federal funds — would not enter the educational programs . . . enlarg[es] the pool of qualified applicants upon which [the school] can draw for its educational program." Id. at 603. Finally, in holding that indirect veterans' educational benefits were subject to Title VI, the *Bob Jones* court stated:

> Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and

> the benefit to a university would be the same in either event. To argue otherwise would be to suggest that the applicability of Title VI turns on the role of a university as an exchange. . . . No rational distinction with respect to Title VI coverage can be made on this basis.

Id. at 603-04. *See also McGlotten v. Connally,* 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (disallowing tax deductions for contributions to racially segregated fraternal organizations as such deductions constitute federal financial assistance under Title VI.)

The decision in *Bob Jones* figured importantly in the postenactment history of Title IX. During the debates on the McClure amendment in 1976, *see supra,* which would have limited the coverage of Title IX solely to "direct" federal financial assistance, Senator Bayh specifically referred to the *Bob Jones* decision under Title VI.

> [T]he inclusion of students who get Federal assistance is not unique. If we followed this route [in amending Title IX] then the next step is to repeal Title VI of the Civil Rights Act because the court has held in other civil rights matters that if a student gets assistance from the Federal Government the university itself is assisted.
>
> The case of Bob Jones University against Johnson is a specific case in question.

122 Cong. Rec. 28145 (1976).

The district court here relied almost solely on the *Bob Jones* analysis when it concluded that indirect federal financial assistance, i.e. BEOGs, brought Grove within the coverage of Title IX. Our discussion of the statute, its legislative history, post-enactment events, and the *Bob Jones* decision has led us to the same conclusion. Thus, we are satisfied that the district court did not err in this ruling.

III.

Section 901 of Title IX also provides that the ban against sex discrimination is restricted to an "education *program or activity* receiving Federal financial assistance." 20 U.S.C. §1681. In addition, §902 limits the Department's authority to terminate federal funding to "the *particular program*, or part thereof" which does not comply with the regulatory requirements. 20 U.S.C. §1682.

Grove argues that construing "federal financial assistance" as including BEOGs is necessarily incompatible with, and mutually exclusive of the statutory requirement that enforcement of Title IX be "program specific." According to Grove, Title IX's reference to "program" or "activity" clearly indicates that the Act's prohibition of sex discrimination cannot apply on a generalized, nonprogrammatic, or institutional basis. Instead, Grove claims that only those programs or activities for which Federal funds are specifically earmarked, are made subject to the Act, and it is only those particular programs or activities from which federal assistance can be withheld in the event violations are found within the particular identified program. From that conclusion, Grove reasons further that because indirect student assistance, such as BEOG grants, cannot be tied to any specific program or activity at an educational institution, Grove cannot, consistent with the program specificity requirement, be a "recipient of federal financial assistance," and, thus, Grove argues, it is not subject to Title IX. In essence, Grove contends that subjecting an entire institution to the requirements of Title IX only by reason of its students' receipt of BEOGs, runs counter to Congress' expressed intent, which limits the application of Title IX to specific programs or activities.

We concede, as we must, that Title IX's provisions, on their face, are program-specific. *See North Haven,* 50 U.S.L.W. at 4507.[20] We cannot agree, however, that Congress intended to limit the purpose and operation of Title IX by a narrow and illogical interpretation of its program-specific provisions. Rather, we believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve, and that the program-specific terms of Title IX must therefore be construed realistically and flexibly. By so doing, contrary to Grove's argument, complete accommodation can be achieved between the concepts of "indirect federal financial assistance" and "program-specific" requirements.

A.

We have previously noted that Title IX is a counter-part of Title VI and is to be similarly interpreted. Like its Title VI counterpart, Title IX also requires that any withdrawal of federal funding must be restricted to the particular acitivity or program in which discrimination is found. It is apparent from the legislative debates that the legislators were profoundly concerned with the possibility of arbitrary and overbroad funding terminations. Fears were expressed during the Title VI debates that an unlimited termination sanction invoked by reason of an isolated violation might result in wholesale cut-off of federal assistance to an entire state thereby affecting state

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[20] In *North Haven,* the Supreme Court held that, "[A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§901 and 902." 50 U.S.L.W. at 4507.

The Court, however, then held that the employment regulations promulgated under Title IX conformed to the program-specific requirement. It is significant, however, that the court did not attempt to define the contours of "program" in its opinion. Thus, to this extent, *North Haven* does not control our decision.

programs unrelated to, and not identified with, the discriminatory practices.[21]

As we understand these legislative concerns, the legislators did not contemplate that separate, discrete, and distinct components or functions of an integrated educational institution would be regarded as the individual programs, to which sections 901 and 902 refer. Whatever the legislators did contemplate by their use of the term "program or activity" we can be certain of only two things: (1) "program or activity" was never intended to be defined in the narrow and restrictive manner urged by Grove; and (2) the precise meaning, content, and parameters of "program" as it applies to the issue presented here have never been established.

Substantiating our view that to date little definitional content has been given to the term program, is the Supreme Court's recent Title IX decision in *North Haven*. In that case, although implicitly adopting an institutional approach to the concept of program,[22] the Supreme Court nevertheless, left to the district court the determination of what constituted the "program" and the extent of the permissible termination of federal funds.

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[21] As Senator Ribicoff stated:

> [I]f there were discrimination in one school district which refused to desegregate, we certainly would not wish to cut off public assistance or cut off road programs. Under Title VI we would deal with each program separately and apply Title VI only where the discrimination occurs.

110 Cong. Rec. 7067 (1969). *Accord,* 110 Cong. Rec. 11942 (1964) (remarks of Attorney General Kennedy); 110 Cong. Rec. 2059, (1964) (remarks of Sen. Pastore); Comment, Board of Public Instruction v. Finch: *Unwarranted Compromise of Title VI's Termination Sanction,* 118 U. Pa. L. Rev. 1113, 1116-24 (1970) [hereinafter cited as Finch Comment].

[22] We note that Justice Powell's interpretation of the majority opinion in *North Haven* indicates that the Court, in validating the Department's employment regulations, had inclined towards an institutionalized application of Title IX, rather than an ear-marked program approach. Justice Powell so argues because the majority opinion includes within Title IX's coverage, employees such as secretaries, guidance counselors, and janitors, who were not participants in any separate, identifiable grant program. *See North Haven,* 50 U.S.L.W. 4508 n.3 (Powell, J., dissenting op.).

Indeed, legal commentators and the few courts confronted with the need to define "program" have recognized that neither the statutes, by their terms, nor the legislative history resolve the question of what constitutes the "program or activity." *See, e.g., Finch Comment,* 118 U. Pa. L. Rev. at 1116-24; Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools, 53 Texas L. Rev. 103, 107-13 (1974); Note, School Desegregation and the Office of Education Guidelines,* 55 Geo. L. J. 325, 344-45 (1966); *Haffer v. Temple University,* 524 F. Supp. 531 (E. D. Pa. 1981), *appeal pending,* No. 82-1049 (3d Cir.).[23] *See also* Note, *supra* note 14.

B.

However "program" may be defined when a *direct* federal grant is involved (an issue not presented here), we are not persuaded that where non-earmarked or *indirect* funding is involved, those statutes proscribing discrimination should be rendered ineffective and without force. As was argued by amicus American Association of University Women, in its supplemental letter memorandum:

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[23]Grove relies on the decision in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), a Title VI case. In *Finch,* HEW had terminated Federal financial assistance to the Taylor County Elementary and Secondary Public School District for its failure to comply with HEW guidelines governing desegregation. The court vacated the termination order and remanded the case to HEW, because HEW had failed to make findings that any of the programs receiving Federal aid had been affected by racial discrimination. The court noted that the school system was receiving money under three federal grant statutes for three specific activities — supplementary education centers, adult education, and education of children from low income families. Each grant statute, concluded the court, constituted the program for purposes of Title VI, 414 F.2d at 1077.

We do not find the decision in *Finch* to be helpful or dispositive of the issues presented by this appeal. *Finch* involved neither across-the-board assistance for general educational purposes nor indirect federal financial assistance. Nor was the Finch court required to go beyond the particular grants in aid there at issue, in determining the contours of the program affected.

> However the Supreme Court ultimately defines "program", it cannot conclude that the more general the scope and purpose of the funding, the more restrictive the coverage of this remedial civil rights statute will be. That result would be logically inconsistent. Yet Grove City asks this court to decide that an institution whose entire purpose is educational is exempt from coverage when it is financed with federal funds that can be used for virtually any educational purpose instead of a clearly limited function. The absurd result if this approach is followed to its logical conclusion is that general higher education aid would never bring the college under Title IX coverage because no specific program within the College would be earmarked to benefit from the federal funding.

American Association of University Women Memorandum, at p. 5-6.

The same principle is implicit in the formula of one legal commentator who defined "program" along these lines:

> [I]f two programs, one receiving federal aid directly and one not, are both administered by the same local agency for the education of essentially the same group of students, and if the funding of the former facilitates the latter by freeing funds for its use, or if discrimination in the latter affects the former by inhibiting or prohibiting a student's participation in that program, then both will be considered part of the same program for purposes of bringing the latter within the reach of Title IX.

Todd, *supra,* 55 Texas L. Rev. at 112.[24] *See also* Note, *supra* note 14, at 624.

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[24]Under Title VI, the former Office of Education regarded a school district's educational system as a single entity or program because discrimination in any particular component of the school program would obviously affect and taint the entire system. It was suggested that any narrower interpretation of a "program" would make it impossible to terminate aid to a school district because each dollar of assistance would have to be related to discriminatory practices. Note, *supra,* 55 Geo. L. J. at 344-45.

The view that non-earmarked or indirect federal funding brings within the definition of "program" an entire integrated institution is supported by the decision in *Haffer v. Temple University*, 524 F. Supp. 531 (E.D. Pa. 1981), *appeal pending*, No. 82-1049 (3d Cir.). That case involved the question of whether Temple University's intercollegiate athletic program was subject to Title IX even though no federal funds have been earmarked for athletics. Temple conceded that it received substantial federal financial assistance for other educational purposes. Nevertheless, Temple argued that "its intercollegiate athletic program is exempt from the requirements of Title IX because it receives no federal funds earmarked for the use of that program", and that "the implementing regulations are invalid insofar as they cover programs or activities that 'benefit from' federal financial assistance but do not recieve earmarked funding." 524 F. Supp. at 532.

In the *Haffer* opinion, then Chief Judge Lord analyzed the pertinent legislative history and concluded that, during the statutorily mandated Congressional review of the Department's regulations, the major focus of controversy centered on whether intercollegiate athletics were covered by Title IX. *See* Hearings on Title IX Before the Subcommittee on Post-secondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 46, 66, 98, 304 (1975) [hereinafter Postsecondary Hearings]; *Haffer* at 536. However, despite the vigorous debate over whether the regulations included athletics, Congress passed no disapproving resolution.[25]

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[25]See text *supra*, typescript at 15-17 discussing Congressional authority to review and disapprove regulations.

We note that Senator Bayh, in his testimony before the House Committee reviewing regulations, stated:

> Those [objecting to the regulation's application of Title IX to athletics] argue that (1) the scope of Title IX is narrow and defined only to include those education programs that received direct federal financial assistance, and (2) since athletics is not an educational program in direct receipt of federal aid, Title IX cannot and should not apply.

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Additionally, the court emphasized that after enactment of Title IX, numerous attempts were made to amend it so as to exclude from the Act's coverage, in whole or in part, intercollegiate athletics.[26] All these attempts were defeated.

Judge Lord thereupon denied Temple's motion for summary judgment. In denying that motion, he reasoned:

> Logic supports a broad reading of Title IX and supports upholding the validity of the regulations. Congress explicitly amended Title IX to exclude social fraternities and sororities from its coverage. I cannot imagine what possible federal funds could have been earmarked for these programs. If such indirectly (if at all) benefitted programs were never intended to be covered by Title IX, it is inexplicable that Congress felt the need to exempt them specifically on another basis. Congressional consideration of the proposed regulations focused almost exclusively on coverage of athletic programs. Indeed, many opponents of such coverage viewed Title IX as the possible death knell of college sports. If intercollegiate athletic programs, which almost never receive direct federal funding, were not intended to be covered, why was this a burning issue in consideration of the regulations?

—Footnote continued from preceding page

> This objection to the coverage of programs which receive indirect benefits from federal support — such as athletics — is directly at odds with the Congressional intent to provide coverage for exactly such types of clear discrimination. For example, although federal money does not go directly to the football programs, federal aid to any of the school system's programs frees other money for use in athletics.
>
> Without federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to federal financial asssistance. If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it.

Postsecondary Hearings at 171.

26 *See* 524 F. Supp. at 534-35.

Id. at 541. *See also Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980) (holding that section 504 of the Rehabilitation Act of 1973, which contains the same program-specific provisions at Title IX, applies to all activities of a public school system receiving federal funds); *Wright v. Columbia University*, 520 F. Supp. 789 (E.D. Pa. 1981) (same holding with respect to activities of a University).[27]

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[27]Grove relies on a number of decisions that have concluded that the program-specific requirement restricted Title IX's coverage to those programs or activities for which federal funds were specifically earmarked.

Most of these decisions, however, were reached in the context of deciding whether Title IX's employment regulations were invalid. *See, e.g.*, Seattle University v. HEW, 16 F.E.P. 719 *aff'd* 621 F.2d 992 (9th Cir. 1980); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980). (*See also* text, *infra*, at typescript 33 & n.29.)

The Supreme Court has subsequently vacated the decision in *Seattle University* and *Dougherty* for further consideration in light of North Haven Bd. of Educ. v. Bell, *see* United States Department of Education v. Seattle University, 50 U.S.L.W. 3934 (1982); Bell v. Dougherty County School System, 50 U.S.L.W. 3934 (1982).

In light of the Supreme Court's decision in *North Haven* and its further action in *Seattle University* and *Dougherty*, we conclude that the analysis of the program-specific requirement found in these cases on which Grove relies is questionable and we decline to follow it.

Similarly, we decline to follow Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), Bennett v. West Texas State University (N.D. Texas 1981), and Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981). *Othen* and *Bennett* involved decisions, contrary to *Haffer*, that Title IX does not cover intercollegiate athletics. Both decisions relied heavily on the pre-*North Haven* employment regulation cases, as did *Rice*.

We also reject the reasoning and holding of University of Richmond v. Bell, No. 81-0406R (E.D. Va. July 8, 1982), which enjoined the Department from investigating the University's athletic department or any educational program or activity not the recipient of *direct* federal financial assistance, even though the financial assistance which the University received included National Direct Student Loans, BEOGs, Supplemental Educational Opportunity Grants, and a Library Resource Grant.

Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." Were it otherwise, and if it had to be demonstrated that each individual component of an integrated educational institution had in fact received the particular monies for a particular purpose, no termination sanction could ever effectively be imposed.

We conclude that the remedy to be ordered for failure to comply with Title IX is as extensive as the program benefited by the federal funds involved. Because the federal grants made to Grove's students necessarily inure to the benefit of the entire College, the "program" here must be defined as the entire institution of Grove City College.[28] Thus, Grove is incorrect in claiming that the program-specific provisions of the statute preclude Title IX coverage when indirect aid is involved.

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[28] Judge Becker's concurrence is admirable in its desire to avoid defining what is the "program" in this case. We would agree that had Grove not raised the issue of whether "indirect federal funding" and "program specificity" are mutually exclusive, we would not be obliged to address that issue in this opinion. Instead, we could have relied wholly on Grove's failure to execute the Assurance of Compliance. However, Grove's main, and indeed its only, argument of any merit was that because Title IX is program specific, it could not apply to Grove, since the "indirect aid" received by Grove was not aid to a specific program, but aid to the entire college. *See typescript at 22-23 supra.* At oral argument, Grove contended that to hold indirect aid to be financial assistance, thereby making the entire college the "program," would directly contradict the intention of Congress to limit the application of Title IX to specific programs and activities receiving federal financial assistance within an institution. Indeed, it likened the concepts of "indirect aid" and "program specificity" to oil and water.

Despite Judge Becker's claims that we ought not to address anything other than Grove's refusal to execute the Assurance of Compliance, he too agrees that we must respond to Grove's primary argument that "program-specificity cannot co-exist with a construction of Title IX that subjects Grove to regulation because of its receipt of [non-earmarked] BEOG funds." Concurring op. typescript at 3. He would answer that argument precisely as did the *amicus* in its brief which we have quoted, *see* typescript

Footnote continued on next page—

IV.

The last issue raised by Grove in its appeal is that the Department cannot require it to comply with Title IX because enforcement of the regulations would unreasonably curtail the College's freedom of association and that of the students. Grove asserts that both it, and its students, have a protected right to associate in an academic community free from unreasonable governmental intrusion. According to Grove, the Department's enforcement of Title IX would impermissibly interfere with the College's autonomy and the values which it seeks to promote among its students.[29] Assuming, without

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—*Footnote continued from preceding page*

at 26, *supra*. The answer thus given in the concurring opinion is no different than the answer we have been obliged to provide, and which appears in text above. Our answer, which also subscribed to the *amicus'* argument, and Judge Becker's endorsement of that argument, reveal no difference in the conclusions reached: namely, that where indirect, non-earmarked funding is involved, the "program" necessarily must embrace the entire college. Moreover, just as we have concluded that we are obliged to answer Grove's argument, Judge Becker also recognizes that this argument made by Grove must be answered.

Contrary to Judge Becker's fears, nothing that we have said in this opinion would foreclose further inquiry in a situation in which "for policy reasons [a college] builds a financial '[C]hinese wall' around a [particular] department or school." Concurring op. typescript at 3. Significantly, this case, does not present a factual configuration which would support theories involving such a "financial Chinese wall" or its corollary, *direct* financial aid to a particular program. As a consequence, no such argument was ever advanced by Grove, nor could it have been.

[29]Grove describes its philosophy in the following manner:

> Since its founding, Grove City College has professed deeply held beliefs regarding the proper role of the individual, government and private education. For over a century, the College has steadfastly maintained a strict independence from governmental funding, holding that the ideals embodied in its educational philosophy draw their essence from the practice of institutional self-sufficiency and autonomy. A similar philosophy guides the political and economic teaching of the College's faculty. Moreover, the College has continued its strong espousal of religious principles. Although it is not controlled or operated by any church, it retains its Christian conscience. It does not discriminate; it does maintain its programs to give equal opportunity to students, faculty and staff. The College has undertaken to do what is morally right without government compulsion.
>
> Brief for Grove City College, No. 80-2384, at 35.

deciding, that Grove has demonstrated a protected associational right, we believe that the reasoning found in a recent decision of the Supreme Court which addressed a federal-state cooperative program for the developmentally disabled, disposes of Grove's argument. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981. Justice Rehnquist, writing for the Court, stated:

> [O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.

451 U.S. at 17 (citation omitted).

Congress has the same power to impose conditions on the use of funds granted to private educational institutions as it has when federal funds are granted to states. *Bob Jones University v. Johnson*, 396 F. Supp. 597, 606 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). In any event, we find it difficult to understand how the first amendment associational rights of Grove and Grove's students are infringed, since both Grove and the students are free to avoid the conditions imposed by Title IX by ending their participation in the BEOG program.

Moreover, the first amendment does not provide private individuals or institutions the right to engage in discrimination. Thus, neither Grove nor its students can assert an alleged first amendment right to be free of the strictures of Title IX's prohibitions of gender discrimination and also claim the right to continued federal funding. *Cf. Bob Jones*, 396 F. Supp. at 607 (Free exercise clause and freedom of association provide no right against termination of federal funding based on Bob Jones's racially discriminatory practices).

V.

After concluding that Grove was subject to Title IX, the district court ruled that Grove's refusal to execute an Assurance of Compliance did not justify the Department's action in terminating funds paid to Grove's students under the BEOG program. The Department appealed this ruling.

A.

First, the district court held that Grove could not be required to sign an Assurance of Compliance, because subpart E of the regulation, which prohibits discrimination in employment[30] was held by the district court to be invalid. According to the district court, Title IX did not authorize the Department to proscribe employment discrimination in educational institutions. Four Courts of Appeals reached the same conclusion.[31] Only the Second Circuit concluded that subpart E was valid. *North Haven Bd. of Educ. v. Hufstedler*, 629 F. 2d 773 (2d Cir. 1980).

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[30] *See* 34 C.F.R. §§106.51-106.61 ("Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited").

[31] *See* Seattle University v. HEW, 621 F.2d 992 (9th Cir.), *vacated and remanded for further consideration in light of North Haven sub nom.* United States Dept. of Ed. v. Seattle Univ., 50 U.S.L.W. 3934 (1982); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); Isleboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). *See also* Kneeland v. Bloom Township High School Dist. 484 F. Supp. 1280 (N.D. Ill. 1980); McCarthy v. Burkholder, 448 F. Supp. 41 (D.Kan. 1978).

In Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), *vacated and remanded for further consideration in light of North Haven sub nom.* Bell v. Dougherty Cty School System, 50 U.S.L.W. 3934 (1982), the Fifth Circuit declined to rule that Title IX did not reach employment discrimination in educational institutions, but held that the subpart E regulation was facially invalid on the grounds that its coverage was not program specific — *i.e.*, that the regulation reached employment practices in programs or activities not receiving "federal financial assistance."

Since the district court's decision, the Supreme Court has resolved this issue by affirming the Second Circuit's decision. *See North Haven Bd. of Educ. v. Bell,* 50 U.S.L.W. 4501 (1982). As a consequence, there is no need for us to make an independent examination of the cases and legislative history for it has now been definitively determined that Title IX does reach discrimination in educational employment.

Since the district court incorrectly concluded that the employment discrimination regulations (subpart E) were void, so much of the district court's order which declared the Assurance of Compliance form invalid and which enjoined the Department from requiring Grove to sign the Assurance of Compliance is in error, and must be reversed.

B.

In addition to declaring the Assurance of Compliance form invalid, the district court's order also enjoined the Department from terminating the payment of monies under the BEOG program until the Department proved that Grove was actually engaged in gender discrimination. The district court concluded that §902 of the Act, 20 U.S.C. §1682, did not authorize the Department to terminate federal financial assistance just because an institution has refused to execute an Assurance of Compliance.

Section 902 of the Act provides the Department with the authority to enforce Title IX's ban against gender discrimination. By its very terms, section 902[32] authorizes the Department to terminate federal financial assistance in order to secure compliance with any regulatory requirement designed to effectuate the objectives of Title IX. Accordingly, the Department provided that, as a condition of approval of federal financial assistance, an assurance from a recipient that it would not discriminate is required. Moreover, by regulation the Department was to specify the form that assurance would take. 34 C.F.R. §106.4(c).

[32]The relevant text of section 902 is reproduced in n. 2 *supra*.

The form prescribed did little more than identify the type of institution applying for federal funds. (A. 18). It required minimal information respecting grievance procedures in the event of complaints, and a statement of self-evaluation concerning the practices of the institution. Primarily it committed the recipient of funds to comply with Title IX and its regulations. As such it constituted a threshold device facilitating the enforcement of Title IX's objectives.

Thus, the assurance regulations, when read in conjunction with section 902, authorize the Department to terminate federal financial assistance upon a recipient's failure to execute an Assurance. We are satisfied that Title IX authorizes the promulgation of the assurance regulation and that the Department can therefore properly condition its grant or denial of funds upon adequate representations that the recipient will not discriminate.

Case law upholding parallel regulations and enforcement measures under Title VI of the Civil Rights Act of 1964 bolsters our conclusion that section 902 gives the Department authority to terminate funding when a recipient fails to comply with the assurance requirement. Section 902 was patterned after section 602 of the 1964 Act and the wording of the two provisions is virtually identical.[33]

In *Gardner v. State of Alabama,* 385 F.2d 804 (5th Cir. 1967), *cert. denied,* 389 U.S. 1046 (1968), HEW had terminated approximately $1,000,000 of funds under five separate federal assistance programs after the State of Alabama failed to execute an Assurance that it would undertake efforts to end racial discrimination in federally assisted programs. Alabama raised various objections to the assurance requirement all of which were rejected by the Court. The Court concluded that

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[33]A counterpart of the instant assurance requirement was promulgated under Title VI at 45 C.F.R. 80.4. *See* 42 U.S.C. 2000d-1.

"the Secretary in issuing [the assurance] regulation was clearly acting within its [sic] rule making power conferred upon it [sic] by statute." 385 F.2d at 817 n.8. *See also United States v. El Camino Community College Dist.*, 600 F.2d 1258, 1260 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) ("in exercising its investigatory powers . . . HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance").

As we read the district court's opinion in this case, it apparently believed that no authority existed for withholding financial assistance where the recipient refused to file an assurance as a matter of conscience and where no evidence of sex discrimination appeared in the record (A. 31). We conclude the district court erred in this respect.

Grove was given the choice of complying with the conditions of Title IX and the regulations promulgated thereunder or foregoing the benefits of federal funds. Grove chose not to comply, and the Department appropriately suspended the student grants through which Grove received the benefits of these monies. *Cf. Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Thus, by enjoining the Department from terminating the BEOGs based on Grove's refusal to file an Assurance and additionally by requiring evidence of actual discrimination, the district court erred.

C.

The district court also enjoined the Department from terminating funds under the BEOG program without affording students who would be adversely affected by such a termination notice and an opportunity to participate in a full administrative hearing. According to the district court, this requirement was mandated by the due process clause of the fifth amendment. We conclude the due process clause imposes no such requirement.

In *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980), HEW had decertified a nursing home and ordered the termination of all Medicare and Medicaid assistance for patients at that home. In a suit brought by the home and six patients who were Medicare and Medicaid beneficiaries, the Supreme Court held that HEW was not required to afford due process hearings to patients as a prerequisite to disqualifying the home. In so doing the Court stated:

> [The grant program] clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified. Second, although the regulations do protect patients by limiting the circumstances under which a ***home*** may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility. Finally, since decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant.

> In holding that these provisions create a substantive right to remain in the home of one's choice absent specific cause for transfer, the Court of Appeals failed to give proper weight to the contours of the right conferred by the statutes and regulations. As indicated above, while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified.

447 U.S. at 785-86 (footnotes omitted).

O'Bannon is dispositive of the due process issue raised here. We perceive no difference between the impact on the students when the Department terminated Grove as an eligible education program and the impact on the patients when HEW decertified the nursing home in *O'Bannon*. If the *O'Bannon* patients had no enforceable expectation of continued benefits to pay for care at Town Court when that nursing home was decertified, neither would Grove's students have an enforceable expectation of receiving grants to attend Grove, after Grove's participation in the BEOG program was ended.

Each student receiving a BEOG has separately been found entitled to receive federal assistance on the basis of personal need and of his or her family's financial status. *See* 34 C.F.R. 690 Subparts C and D. Nothing in the Department's termination of Grove would detract from the individual eligibility of any student to receive a grant. But, as was true in *O'Bannon*, a student at Grove has no right to continued federal benefits to pay for his education at an institution that has not qualified by meeting the conditions for federal assistance. Thus, we reject the claim of the student-plaintiffs that a due process hearing was required.

VI.

We have concluded that Grove is a recipient of federal financial assistance within the meaning of Title IX, even though that assistance is received indirectly through its students, who are the beneficiaries of federal grants. Second, we have concluded that the Assurance of Compliance form (HEW form 639A) was authorized and was valid. Finally, we have concluded that the Department was within its authority in terminating federal financial assistance to the students and to Grove for Grove's failure to execute and file, in accordance with the regulations, the Assurance of Compliance form.

Hence, so much of the district court's order, from which Grove appealed at No. 80-2383, and which held that Grove was a "recipient" within the meaning of Title IX, will be affirmed. So much of the district court's order, from which the Department appealed at No. 80-2384, and which invalidated the Assurance of Compliance form, and enjoined the Department from using that form and from terminating student BEOGs, will be reversed.

Accordingly, we will reverse so much of the district court's order of June 26, 1980, as is inconsistent with this opinion and with our holdings, and we will remand the case to the district court for the entry of an appropriate order consistent with this opinion.

BECKER, *Circuit Judge,* concurring in the judgment and in all but Part III of the opinion:

I agree with the result reached by the majority. I write separately because of the unnecessary breadth of the majority's opinion, which effectively decides cases not before this panel but which are or will someday be before this Court.

Part III of the majority opinion deals primarily with the question whether construing "federal financial assistance" to include BEOGs is necessarily incompatible with, and mutually exclusive of, the statutory requirement that enforcement of Title IX be "program specific." The majority answers this question by concluding that when the federal government furnishes indirect or non-earmarked aid to an institution, the institution itself must be the "program" for purposes of Title IX. (Majority typescript op. at 30). That conclusion is unnecessary to the decision of this case. The controversy here does not implicate the application of Title IX to specific programs or activities within Grove's curriculum. Instead, the essential issue merely concerns Grove's refusal to execute the Assurance of Compliance. As a result, this case involves only a challenge to the facial validity of the Assurance of Compliance, and we need not pose the question raised by *Haffer v. Temple University*, 524 F. Supp. 531 (E.D. Pa. 1981), *appeal pending*, No. 82-1049 (3d Cir.), whether a particular program within a university which has executed the Assurance of Compliance may be regulated under Title IX.[1] The majority's conclusion in Part III-C thus is *dicta*.

Pursuant to its regulations, 34 C.F.R. §106.4(a), the Department requires each recipient of federal aid to file an Assurance of Compliance as a means of securing adherence to Title IX. Under the Assurance in use at the time this case was filed, the recipient agrees that it will

> [c]omply, to the extent applicable to it, with Title IX . . . and all requirements imposed by . . . the Department's regulation . . . to the end that, in accordance with Title

[1]One reason for our concern about dealing with that question is that the issue raised in *Haffer* and *University of Richmond v. Bell*, No. 81-0406-R (E.D. Va. July 8, 1982), regarding whether the receipt of federal assistance subjects the entire institution to Title IX regulation, is highly controversial. In *University of Richmond*, Judge Warriner is dubbed the theory adopted in *Haffer* the "benefits" or "infection" theory. After surveying the same cases cited in the majority's note 27, he rejected *Haffer*, concluding that its approach was aberrational. The majority has pronounced that *Haffer* is correct and that the reasoning of the other courts is infirm. *See* Majority typescript at 30, n. 27.

> IX . . . no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any education programs or activity for which the Applicant receives or benefits from federal financial assistance. . . .[2]

Our decision in this case must be guided by *North Haven Bd. of Educ. v. Bell,* 50 U.S.L.W. 4501 (1982), in which the Court examined the program-specificity of regulations governing employment discrimination in recipient schools. The critical paragraph of the Court's discussion of the program-specificity issue states:

> Examining the employment regulations with this restriction in mind, we nevertheless reject petitioner's contention that the regulations are facially invalid. Although their import is by no means unambiguous, we do not view them as inconsistent with Title IX's program-specific character. The employment regulations do speak in general terms of an educational institution's employment practices, but they are limited by the provision that states their general purpose: "to effectuate title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity* receiving Federal assistance. . . ." (emphasis original) (footnote omitted).

50 U.S.L.W. at 4507. The Court's discussion applies with equal force to this case. By its very terms, the Assurance of Compliance is program-specific, for it applies only to an "education *program or activity* for which the Applicant receives or benefits from Federal financial assistance. . . ." (emphasis supplied). The termination of assistance to Grove is equally program-specific, for the Department took this action only in response to

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[2]The Assurance of Compliance currently in use is not materially different. *See* Majority Opinion n. 5.

Grove's refusal to assure, by executing the Assurance of Compliance, that it would not discriminate on the basis of sex in any program or activity receiving federal financial assistance.

I agree that it is necessary for us to respond to Grove's contention that program-specificity cannot coexist with a construction of Title IX that subjects Grove to regulation because of its receipt of BEOG funds not earmarked for use in any specific program at the institution. In response to Grove's argument, I would endorse the passage from the *amicus curiae* brief of the American Association of University Women quoted in the majority's opinion (Majority typescript op. at 26). The conclusion of that passage — that it is incorrect to contend that the more general the scope and purpose of the funding the more restrictive the coverage of this remedial civil rights statute — is an effective shield against the contention that non-specific and non-earmarked BEOGs are necessarily incompatible with Title IX's program-specificity. The majority, however, turns this shield into a sword and reaches the conclusion, certainly dispositive of this case but nonetheless unnecessary to its disposition, that recipt of non-earmarked federal assistance transforms the entire institution into a "program" for purposes of Title IX.

I am concerned that the majority's overbroad decision will foreclose inquiry responsive to specific facts in cases in which a college or university, for policy reasons independent of a concern about Title IX regulation, builds a financial "chinese wall" around a department or school so that a particular program or activity is not funded out of the same pool into which federal assistance has been poured. My judicial experience has taught me that one cannot prejudge the kind of record or arguments that will be developed in future cases.

Whether or not it is a long step from my analysis to the conclusion reached in Part III-C by the majority, it is a significant step, and one that ought not to be taken except in the context of a record or relevant legal arguments requiring that a decision on the point be made.[3]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[3]Part III also purports to address the argument that because indirect student assistance, such as BEOG grants, cannot be tied to any specific program or activity at an educational institution, Grove cannot, consistent with the program-specificity requirement, be a "recipient of federal assistance," and, thus subject to Title IX. I do not here address the majority's treatment of that argument. Grove's status as a "recipient" is settled by the legislative history and by *North Haven*, as is ably demonstrated by Part II of the majority opinion.

AMENDED OPINION AND ORDER OF THE DISTRICT COURT JUNE 26, 1980.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GROVE CITY COLLEGE, individually and on behalf of its students, MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Plaintiffs,

vs.

PATRICIA HARRIS, Secretary of the United States Department of Health, Education and Welfare; ROMA J. STEWART, Director of the United States Office for Civil Rights,

Defendants.

CIVIL ACTION NO. 78-1293

AMENDED PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, DISCUSSION AND ORDER

Preliminary Statement

This litigation was generated by the initiation of a compliance proceeding against Plaintiff, Grove City College alone, (hereinafter referred to as "College") under Title IX of the Education Amendments of 1972, (20 U.S.C. 1681 *et seq.)* and the regulations of the Department of Health, Education and Welfare, (hereinafter referred to as "HEW") 45 C.F.R. Parts 80, 81 and 86 as promulgated by the then Secretary of HEW, Joseph Califano.

In July of 1977, Secretary Califano requested that the College execute HEW Form 639A, which is captioned, *"Assurance of Compliance with Title IX of the Education Amendments of 1972, and the Regulation Issued by the Department of Health, Education and Welfare in Implementation Thereof"*. (See Exhibit "A" to Plaintiffs' Complaints for a copy of said form)

HEW insisted that the College must execute Form 639A, and contended that since a good number of the College's students received Basic Education Opportunity Grants, (hereinafter referred to as ("BEOG") and Guaranteed Student Loans, (hereinafter referred to as "GSL") and because these programs were financed with Federal funds and were used by the students to defray educational expenses, that the College was caused to be a "recipient" of Federal financial assistance as that term is defined in 45 C.F.R. Part 86, and the College was therefore duty-bound to execute Form 639A.

Further, the Secretary contended that if the College refused to execute this form, the College and the students at the College would no longer be allowed participation in the GSL and BEOG Programs pursuant to §902 of Title IX (Title 20 U.S.C. §1682). There was no allegation or proof offered by HEW that the College was, in fact, guilty of discrimination on the basis of sex in any manner whatsoever.

The College contended that it was not a recipient of Federal financial assistance by virtue of the GSL and BEOG Programs, and to the extent that HEW's regulations deemed the College to be such a recipient, they were an invalid extension of the statute, and that in any event, the HEW regulations were overbroad because they were not limited to regulating those programs that received Federal financial assistance. In addition, the College claimed the HEW has promulgated regulations which, as applied to Plaintiffs, exceed the scope of

§§ 901 and 902 of Title IX, (20 U.S.C. §§ 1681, 1682) and that said regulations of HEW as the same were applied to the College, violate the First and Fifth Amendments to the Constitution of the United States. The College, on the basis of conscience and principle, refused to execute the *Assurance of Compliance with Title IX.*

Thereupon, HEW initiated a compliance proceeding, and subsequently, an administrative hearing was held before HEW Administrative Law Judge, Albert Feldman, on March 10, 1978, in Philadelphia, Pennsylvania. It is important to note that only the College was named as a respondent, and none of the College's students were parties and they were not otherwise represented at the administrative proceeding even though over three hundred of them had a direct interest in the outcome of that hearing.

In his opinion, dated September 18, 1978, Judge Feldman did not address the College's constitutional arguments, ruling that his authority was restricted to determining whether the College complied with HEW's regulations. Significantly, however, Judge Feldman stated on page 9, of his decision that:

> "There was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief."

And, Judge Feldman further wrote on page 9, of his decision:

> "There is, very clearly, given to the Director a total and unbridled discretion to require any certificate of compliance that he may desire, whether the same be reasonable, or, to reasonable men, unreasonable. There are no guidelines. There is no necessary continuity, as from one Director to a successor Director whose opinions as to what constituted compliance might be totally different from those of his predecessor."

> "The Administrative Law Judge is not persuaded by any of the cases cited that this authority in the regulations has been struck down. Under the circumstances, the regulations being binding upon the Administrative Law Judge, he must rule in accordance therewith. The Director is given unlimited discretion so that the Administrative Law Judge has no authority to rule and is powerless to rule either that the regulations are unconstitutional or that the regulations exceed the statutory authority."

See in the matter of *Grove City College*, Docket No. A-22, P. 9 (HEW Administrative Proceeding, Sept. 15, 1978). (Initial Decision)

Since the College conceded that it did not sign the Assurance of Compliance required by the regulations, Judge Feldman found that the College was not in compliance. He, therefore, ordered that students who attended the College were ineligible to receive BEOG's or GSL's, and the following is the full text of the Final Order as drafted by Judge Feldman, and as adopted by the Secretary:

> "IT IS HEREBY ORDERED:
>
> 1. Federal financial assistance administered by the Department of Health, Education and Welfare under the following authorization is to be terminated and refused to be granted to the respondent institution:
>
> a) Basic Education Opportunity Grant Program, 20 U.S.C. §1070a.
>
> b) Guaranteed Student Loans Program, 20 U.S.C. §1071 *et seq.*
>
> 2. Additional Federal financial assistance which the respondent institution would be eligible to receive, either from the Department or through the Commonwealth of Pennsylvania, but for its non-compliance with Title IX, is to be refused to be granted.

3. This termination and refusal to grant or continue Federal financial assistance shall remain in force until the respondent institution corrects its noncompliance with Title IX and satisfies the Department that it is in compliance.

4. This initial Decision and Order shall become final unless, within twenty (20) days after mailing the initial Decision and Order, either party submits exceptions to the Reviewing Authority in accordance with 45 C.F.R. §81.102.

/s/ ALBERT P. FELDMAN
Albert P. Feldman
Administrative Law Judge

Date: September 15, 1978"

Pursuant to 45 C.F.R. §81.104, Judge Feldman's Order became final on October 14, 1978. On November 29, 1978, Plaintiffs commenced this suit.

In the action before this District Court, the Plaintiffs are Grove City College, and four of its students, namely, Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga.

The Plaintiffs allege that their action arises under Title IX of the Educational Amendments of 1972, 86 Stat. 373, as amended, 88 Stat. 1862 (1974), 90 Stat. 2234 (1976), 20 U.S.C. §1681 *et seq.* ("Title IX"). Plaintiffs further allege that this Court has jurisdiction for review purusant to Title IX, 20 U.S.C. §1682; The Administrative Procedure Act, 5 U.S.C. §701 *et seq.;* The Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; 28 U.S.C. §1331 and 28 U.S.C. §1361.

The Plaintiffs request this Court to find that the aforestated Order of the Secretary of HEW requiring the College to execute the Assurance of Compliance or in the alternative suffer the

termination of the BEOG and GSL benefits to the College's students, including the individual Plaintiffs, is null and void and of no legal effect.

In due course, HEW filed an Answer to the Complaint filed by the Plaintiffs in this case.

The Plaintiffs responded by filing what their attorneys have described as a "Motion for Judgment on the Pleadings", with supporting affidavits pursuant to Rule 12 of the F.R.C.P., but this Court will treat the Motion as one for Summary Judgment pursuant to Rule 12c and Rule 56 of F.R.C.P.

The Defendant HEW thereupon filed a cross-motion for Summary Judgment.

There are no disputed and/or triable questions of material fact noticed by this Court, the parties have briefed and argued their respective points, and the matter is ripe for a decision by this Court.

The sub-issues of law that must be decided in order to determine the validity of the administrative Order in question are as follows:

1) Does this Court have jurisdiction to presently adjudicate this case?
2) Does Title IX of the Educational Amendments of 1972, Title 20 U.S.C. §§1681 *et seq.* apply to Plaintiff Grove City College and/or to the four individual Plaintiffs in this case, and if so, to what extent?
3) Do HEW's regulations (45 C.F.R., Part 86) which purport to implement Title IX of the Educational Amendments of 1972, Title 20 U.S.C. §§1681 *et seq.* unlawfully exceed the statutory authority and legislative purposes of the sex discrimination provisions of the said Educational Amendments of 1972 in the area of:

a) Subject matter coverage:
   A. As to Grove City College?
   B. As to the individual student Plaintiffs?
b) Enforcement coverage:
   A. As to Grove City College?
   B. As to individual student Plaintiffs?

4) Are HEW's regulations in this case 45 C.F.R., Part 86) unconstitutionally applied to:
   a) Grove City College?
   b) The individual student Plaintiffs?

5) Should Grove City College be required to execute the Assurance of Compliance?

6) Should the BEOG and/or the GSL assistance programs for the students be terminated?

AMENDED FINDINGS OF FACT

1. Grove City College ("College") is a private co-educational institution of higher education, affiliated with the United Presbyterian Church, located in Grove City, Pennsylvania, and chartered as an educational institution under the laws of the Commonwealth of Pennsylvania.

2. Marianne Sickafuse, a resident of Pennsylvania, is a full-time student at the College, who is a recipient of a Basic Educational Opportunity Grant (BEOG) totaling $400.00, for the academic year 1978-79. Said student will be unable to continue to attend this College of her choice without the receipt of said financial assistance and will be irreparably harmed, if said grant is terminated as it relates to the College.

3. Kenneth J. Hockenberry, a resident of New Jersey, is a full-time student at the College, who is a recipient of a Basic Educational Opportunity Grant (BEOG) totaling $600.00, as well as a Guaranteed Student Loan (GSL) totaling $2,000.00, for the academic year 1978-79. Said student will be unable to

continue to attend this College of his choice without the receipt of said financial assistance and will be irreparably harmed, if said grant and loan is terminated as it relate to the College.

4. Jennifer S. Smith, a resident of Pennsylvania, is a full-time student at the College, who is a recipient of a Guaranteed Student Loan (GSL) totaling $1,000.00, for the academic year 1978-79. Said student will be unable to continue to attend this College of her choice without the receipt of said financial assistance and will be irreparably harmed, if said loan is terminated as it relates to the Ccollege.

5. Victor E. Vouga, a resident of Wisconsin, is a full-time student at the College, who is a recipient of a Guaranteed Student Loan (GSL) totaling $2,500.00, for the academic year 1978-79. Said student will be unable to continue to attend this College of his choice without the receipt of said financial assistance and will be irreparably harmed, if said loan is terminated as it relates to the College.

6. Defendant, Patricia Harris, (the "Secretary") is the Secretary of the Department of Health, Education and Welfare, ("HEW") and HEW is administered under the supervision and direction of Defendant Secretary, Patricia Harris.

7. Defendant, Roma J. Stewart, successor to original Defendant, David Tatel, is the Director of the Office for Civil Rights, ("OCR") the Division of HEW responsible for enforcement of Title IX. The Office for Civil Rights is administered now under the supervision and direction of Defendant Roma J. Stewart.

8. Title IX of the Education Amendments of 1972, (20 U.S.C. §§1681 *et seq.)* provides, *inter alia:*

> a) No person in the United States shall, on basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . (20 U.S.C. §1681(a).

9. In enforcing the non-discrimination requirements of Title IX, each Federal department and agency which is empowered to terminate Federal financial assistance, *other than assistance involving contract of insurance of guaranty,* is authorized to issue rules, regulations and orders. (20 U.S.C. §1682) Pursuant to this authority, the Secretary has issued regulations establishing certain requirements for recipients of Federal financial assistance administered under the auspices of HEW. In addition, the Secretary has designated the Director of OCR as his chief enforcement officer under Title IX. 45 C.F.R., Part 86 (1977).

10. The Secretary's regulations have defined Federal financial assistance to include funds made available for:

> (i) The acquisition, construction, renovation restoration or repair of a building or facility or any portion thereof; and
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity;
>
> (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
>
> (3) Provision of the services of Federal Personnel.
>
> (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
>
> (5) Any other contract, agreement or argument which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty. 43 C.F.R. 86.2(g)(1) (1977).

11. The Secretary's regulations have defined a recipient of Federal financial assistance as follows:

> (h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State of political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof. 45 C.F.R. 86.2(h) (1977)

12. The Secretary requires that an Assurance of Compliance (Form 639) with Title IX be executed by all educational institutions which it considers to be recipients of Federal financial assistance, or for all institutions which are applicants for Federal financial assistance. 45 C.F.R. 86.4 (1977)

13. This Assurance of Compliance is not limited to any specific educational program or activity carried out by the recipient or applicant, but requires a contractual guarantee that the signatory educational institution will comply with all regulations issued by HEW pursuant to Title IX without limitation, including subpart E of the same. (See Exhibit "A" attached to the Complaint).

14. Currently the aforementioned regulations include, *inter alia*, those concerning employment, housing, athletics, health services, counseling and employment assistance to students. 45 C.F.R. subparts D & E (1977).

15. The College receives no Federal or State financial aid, and more particularly, receives no financial aid either from HEW or the Commonwealth of Pennsylvania, except such financial assistance that is received by the College through the BEOG program, and the GSL program.

16. One hundred forty of the College's students, including Kenneth J. Hockenberry and Marianne Sickafuse are eligible to receive Basic Educational Opportunity Grants (BEOG's) appropriated by Congress and allocated by the Secretary pursuant to 20 U.S.C. §1070a.

17. One of the College's functions with respect to BEOG's is to certify that students applying for the grants are matriculating at the College.

18. BEOG's are distributed by the Secretary directly to students, including students such as Kenneth J. Hockenberry and Marianne Sickafuse, without participation of the College, other than to make the required certification referred to in Paragraph 17 of these Findings of Fact.

19. Three hundred forty-two of the College's current students, including Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, have obtained loans (GSL's) from private lending institutions or banks which are guaranteed by the Commonwealth of Pennsylvania. The United States, in turn, guarantees eighty (80%) per cent of the Commonwealth's obligation. The interest due upon these loans is paid directly to the private lending institutions or banks for a limited period of time by the United States through the Secretary pursuant to provisions of the Guaranteed Student Loan Program (GSL), 20 U.S.C. §§1071 *et. seq.*

20. One of the College's functions with respect to the GSL program is to certify a student's enrollment and the College's own current schedule of educational expenses.

21. GSL funds are distributed to students, including students such as Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, without participation of the College, other than to make the required certification referred to in Paragraph 20 of these Findings of Fact.

22. During July 1976, the Secretary requested the College to execute an Assurance of Compliance as required by 45 C.F.R. §86.4 (1977), requiring *inter alia,* assurance that the College was operating federally-funded educational programs in compliance with Title IX and all applicable HEW regulations (45 C.F.R. Part 86) implementing Title IX.

23. The College refused to execute HEW's Assurance of Compliance on the grounds that it receives no Federal financial assistance, [and that HEW regulations 45 C.F.R. Subpart E is unlawfully being applied to the College.]

24. Pursuant to 45 C.F.R. Parts 80, 81 and 86 (1977), the Secretary began administrative proceedings to declare the College and thereby its students, including Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, ineligible to receive BEOG's, GSL's and any other Federal financial assistance administered by the Secretary while said students are attending Grove City College. However, said students *were not* made parties to said proceeding and *were not* given an opportunity to be heard.

25. Following a hearing before an Administrative Law Judge, by decision and Order dated September 18, 1978, ("Order") the College was found to be a recipient of Federal financial assistance. The decision of the Administrative Law Judge further found that ". . . there was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX . . .". No sex discrimination was alleged or proved at said hearing.

26. As a consequence of the "Order", the College and thereby its students, including Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, were declared ineligible to participate in either the BEOG or GSL pfograms [,while said students are attending Grove City College.]

27. Students attending the College, including Marianne Sickafuse, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, who have already been granted funds under either the BEOG or the GSL programs, will according to the "order", receive no further funds under either program, while said students are attending Grove City College.

28. The "Order" is a final Order of the Secretary. 45 C.F.R. §81.104 (1977).

29. Plaintiffs have exhausted their administrative remedies. 45 C.F.R. §81.106 (1977).

AMENDED CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this controversy.

2. The Order of the Administrative Law Judge is a final Administrative Order that is subject to review by this Court.

3. The regulations issued by HEW entitled *"NON-DISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE"*, 45 C.F.R. Part 86, are final regulations and are subject to judicial review by this Court.

4. The four student Plaintiffs are directly and adversely affected by the Order of the Administrative Law Judge, and to compel them to exhaust administrative compliance procedures under the exigent circumstances of this case would be an inadequate remedy and of no value in resolving the questions concerning HEW's underlying authority to promulgate and enforce compliance with the regulations involved in this case.

5. Title IX of the Educational Amendments of 1972, Title 20 U.S.C. §§ 1681 *et seq.* applies to Plaintiff Grove City College and the two student Plaintiffs, Marianne Sickafuse and

Kenneth J. Hockenberry by virtue of their participation in the Basic Educational Opportunity Grant Program. However, these educational grants can only be terminated after a hearing is held for both College and student recipients and only upon a showing of actual discrimination on the basis of sex in recruitment and admissions and in education programs and activities only.

6. Although the Guaranteed Student Loan Program (GSL) is financial assistance that brings Grove City College under the coverage of Title IX of the Educational Amendments Act of 1972, nevertheless, HEW, pursuant to the express terms of Section 902 of Title IX, is forbidden from terminating the GSL financial assistance to the Plaintiff students as a means of enforcing the anti-sex discrimination provisions of Section 901, Title IX, because this Court finds as a matter of law, that the GSL program is a contract of guaranty. It is unlawful for HEW to terminate an education program or activity aided by financial assistance from the Federal Government which involves a contract of guaranty, in order to enforce compliance with any HEW rule or regulation pertaining to the anti-sex discrimination provisions of Title IX. Even though a GSL program is financial assistance that brings a College under the coverage of Title IX, compliance with said Title must be effectuated, if any enforcement activity is indicated, by "other means authorized by law". (See Section 902, subparagraph 2 of Title IX).

7. HEW's regulations, subpart E, 45 C.F.R. 86.51 through 86.61, inclusive, which regulations purport to address discrimination on the basis of sex in employment in educational programs and activities unlawfully exceed the statutory authority and legislative purposes of the anti-sex discrimination provisions of the Educational Amendments of 1972, and a regulation that requires the College to assure compliance with subpart E is likewise null and void and of no legal effect. 45 C.F.R. 86.4

8. Consequently, HEW cannot properly and/or lawfully require and/or request Grove City College to execute an Assurance of Compliance with regulations that encompass subpart E, for the reason that said regulations in subpart E purport to cover employees of educational institutions who are not protected persons under Title IX.

9. HEW's regulations subparts A, B, C and D (45 C.F.R. 86.1 thru 86.43) apply to the College and also to the four students as persons who are in the class to be protected from sex discrimination under the Act, and as recipients of Federal financial assistance are covered by these regulations. However, all four of these Plaintiff students in any case are entitled to a hearing before their Federal financial assistance can be lawfully terminated. See Title 20 U.S.C. §1682(1).

10. Inasmuch as Marianne Sickafuse and Kenneth J. Hockenberry did not receive a hearing as required by Section 902 of Title IX and by the United States Constitution before their BEOG benefits were terminated, it is the conclusion of this Court that the HEW Order purporting to terminate the BEOG benefits of the student Plaintiffs, (as well as the other College students adversely affected) is declared to be void and of no legal consequence.

11. HEW's regulations (subpart E) in this case are unlawfully applied to Grove City College because they exceed the Congressional mandate. But said regulations would not have been unconstitutional as applied to Grove City College if the Congressional authority and legislative purpose had not been exceeded by HEW's regulations.

12. Although HEW at some future time may properly demand Assurance of Compliance as to subparts C and D of Title IX regulations, HEW on the present state of this record, lawfully cannot impose any sanctions on the students or the College for the College's failure to execute the Assurance of Compliance form as it is presently formulated for the following reasons:

a) The Assurance of Compliance form as presently written, unlawfully concerns itself with discrimination on the basis of sex in the College's employment program, i.e. subpart E of the HEW regulations, (Congress did not intend Title IX to cover this area), and the College cannot be required as a matter of law to fill out this fatally defective form.

b) Both the BEOG and the GSL program, as well as the Title IX legislation were designed to specifically protect and advance the rights of students only, and so as a matter of sound public policy in balancing and considering the interests sought to be protected and advanced by each program, the BEOG program and/or GSL program at a College should not be terminated in any case, unless and until there is a specific finding of sex discrimination at such College. Otherwise, an innocent student would be unfairly punished by the loss of his or her BEOG benefits without receiving any concomitant benefit (i.e. being freed from improper or unseemly sex discrimination) merely because as a matter of conscience the College failed to file a form. Both male and female students would be irreparably harmed by losing their financial aid in a case where there is absolutely no evidence of sex discrimination. (This reasoning applies equally to the GSL program if this Court had not held the GSL programs to be exempt from Title IX enforcement coverage.)

13. HEW's regulations as applied to the four student Plaintiffs are unconstitutional and are otherwise unlawful for several reasons:

a) The four Plaintiffs were deprived of their rights to BEOG and GSL benefits without a hearing of any kind.

b) The four Plaintiffs were denied these rights to BEOG and GSL benefits without a prior determination that sex discrimination, in fact, existed.

c) Plaintiffs Hockenberry, Smith and Vouga, were deprived of their GSL rights without any warrant at all in law inasmuch as these benefits are exempted from termination by Section 902 of Title IX's express provision. (See Title 20 U.S.C. §1682, first paragraph, which exempts from the enforcement provisions of the act loans to students by private banks, etc., when said loans are guaranteed by Federal Government.

14. Inasmuch as Plaintiffs Hockenberry, Smith and Vouga did not receive a hearing as required by the Fifth Amendment to the United States Constitution before their GSL benefits were terminated, and inasmuch as it has been determined by this Court that GSL benefits are exempted from the enforcement provisions of Title IX, it is the conclusion of this Court that the HEW Order purporting to terminate the GSL benefits of the student Plaintiffs, (as well as the other College students adversely affected) is declared to be null and void and of no legal consequence.

15. A document identified as Exhibit P-1, was presented to the Court by the HEW Attorneys via letter dated November 29, 1979. This document, Exhibit P-1, is entitled "Assurance of Compliance with the Deparment of Health, Education and Welfare Regulation under Title VI of the Civil Rights Act of 1964", and purports to be an agreement by Grove City College to comply with the HEW regulations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* as of June 30, 1965. The Court concludes that this document is irrelevant to this case for the reason that whether the College is sincere or not in its claim that it now refuses to sign the Assurance of Compliance pursuant to Title IX on the basis of "conscience", is immaterial to the decision of this Court in this case.

AMENDED DISCUSSION

This Court now will review the protections and sanctions provided by Title IX prohibiting sex discrimination in educational programs. Title 20 U.S.C. §1681, (Section 901 of Title IX), provides in pertinent part that:

> "a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title 20 U.S.C. Section 1682, (Section 902 of Title IX) provides for Federal administrative enforcement by Federal departments and agencies extending Federal financial assistance to any education program by issuance of rules, regulations, or orders of general applicability, "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance." Sanctions for non-compliance with applicable regulations are specifically set out in §1682:

> "Compliance with any requirement adopted pursuant to this action may be affected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the . . . recipient . . . and shall be limited in its affect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . .".

Section 1683 of Title 20 (Section 903 of Title IX), provides for judicial review of agency action taken under §1682.

Pursuant to §1682 (§902 of Title IX), HEW issued final regulations to implement this legislation, namely, 45 C.F.R. Part 86 which became effective on July 21, 1975.

As heretofore noted, the College refused to sign an Assurance of Compliance form containing a contractual obligation to abide by subparts D and E of said regulations. Upon the College's refusal to sign the form, HEW commenced procedures which ended in a final administrative Order terminating the BEOG and GSL assistance to Plaintiff students which obviously includes the termination of all of the Federal financial assistance from these programs which HEW contends was received by the College.

IS THIS MATTER RIPE FOR A JUDICIAL CONSIDERATION BY THIS COURT?

Title 20 U.S.C. §1683 (Title IX) provides for judicial review of final agency action, however, HEW contends that the matter is not ripe for judicial determination. Because it is undisputed that the Administrative Law Judge issued a final Order immediately and adversely affecting the financial interests of hundreds of people, it would be difficult to find a more ripened case for judicial review.

The Plaintiff students, and many other similarly situate at the College by virtue of the administrative Order, face the immediate loss of their Federal educational grant. This aid is absolutely necessary if they are to continue as students at the College of their choice. The material facts in this case are not subject to dispute.

The pure legal issue from the Plaintiffs' point of view is whether this Court can presently determine if HEW has the legal right under Title IX and/or under the United States Constitution in the light of the undisputed facts, to cut off the Federally assisted students' BEOG and GSL programs because of the College's failure to execute a HEW form captioned "Assurance of Compliance".

The question as to the ripeness of the Plaintiffs' challenge to HEW's statutory authority undoubtedly meets both prongs of the *Abbott Laboratories'* test upon which Defendants rely. See 387 U.S. 136, 148-49 (1967). First, in determining whether a claim is appropriate for judicial decision, *Abbott Laboratories* asks whether a purely legal issue is presented to the Court (387 U.S. at 149). Despite HEW's efforts to construe it differently, a purely legal issue is now presented to this Court as was the case in *Abbott Laboratories*. The Court in Abbott Laboratories stated:

> "Both sides moved for summary judgment in District Court, and no claim is made . . . that further administrative proceedings are contemplated . . . both sides have approached this case as one purely of congressional intent, and . . . the Government made no effort to justify the regulation in factual terms."
>
> (See pages 148-149, 87 S. Ct. Page 156, of that Opinion.)

Further, the HEW administrative determination constituted final agency action within the meaning of the Administrative Procedure Act. See 45 C.F.R. 81.104. Plaintiff College presented its challenge to HEW's jurisdiction in the administrative proceeding and has preserved that point on appeal. Consequently, there can be no doubt that the legitimacy of HEW's regulations is at issue here.

With regard to the second prong of the *Abbott Laboratories'* test, it is difficult to imagine a more concrete harm than that which would be presented should this Court decline to rule on HEW's authority to apply the regulations subparts D and E. Because of the impending aid cut-off, the College is confronted with the dilemma of either submitting to regulations which it (and several Courts) believes to be beyond the authority of HEW to enforce or it is threatened with the denial of the BEOG and GSL benefits to its students. If it chooses the former, it will have to undertake the expensive and time-consuming record-

keeping, reporting and other affirmative requirements imposed by subpart E in particular, and then expose itself to further ultra vires proceedings at HEW's pleasure for any alleged sex discrimination in employment at the College, which is precisely the type of direct and immediate harm contemplated by the Supreme Court in *Gardner v. Toilet Goods Association*, 387 U.S. 167, 172-3 (1967). Following HEW's suggestion, that the College simply allow the students' aid to be terminated is tantamount to asking it to give up the right to the judicial review specifically granted by §903 of Title IX, 42 U.S.C. §1683, and without any allegation and/or evidence that sex discrimination against students at said College exists.

More importantly, HEW's assertion regarding ripeness totally ignores the position of Plaintiff students who are the real losers should the aid cut-off occur. Any refusal of this Court to consider Plaintiff students' challenge to HEW's regulatory authority leaves them no opportunity for judicial review in a case where, but for immediate judicial relief, they (the students) will be irreparably damaged without any corresponding social good.

The conclusion of the Supreme Court in *Abbott Laboratories* is thus appropriate here:

> "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the Plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the Courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar of some other unusual circumstance . . .".

In *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F2d 581 (6th Cir.) cert. denied ___ U.S. ___ 100 S. Ct. 467, 62 L.Ed. 2d 388 (1979), HEW also raised ripeness objections when a local school district challenged HEW's authority to promulgate and apply subpart

E (employment) of its Title IX regulations. Despite the fact that administrative proceedings had not been completed and no Order had been issued cutting off aid from the school district, the Sixth Circuit ruled that the case was ripe for judicial resolution, stating:

> "The only issue raised by Plaintiffs' Complaint is Defendants' authority under Title IX to promulgate the regulations contained in sub-part E of 45 C.F.R. §86.1 *et seq.*". Id. at 1028.

In another similar pre-final enforcement case challenging HEW's authority to promulgate and apply its subpart E regulations, the District Court also found HEW's ripeness argument "unpersuasive". *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Maine 1978) *aff'd sub nom.* Isleboro School Committee v. Califano, 593 F2d 424 (1st Cir.) cert. denied, ____ U.S. ____, 100 S. Ct. 467, 62 L. Ed 2d 387 (1979). It reasoned as follows:

> "The basic test for determining ripeness involves an examination of whether 'there is a substantial controversy between parties having adverse legal interest, of sufficient immediacy and reality' to warrant a judicial decision . . . Applying this test, the propriety of judicial resolution of the question here presented is manifest. The facts are undisputed; the matter before the Court is of a strictly legal nature . . . There exists a concrete controversy between the parties which is ripe for judicial determination."
>
> 449 F. Supp. at 875 (citations omitted)

See also *Seattle University v. HEW*, 16 FEP Cases 719 W.D. Wash. (1978), *appeal pending*, No. 78-1746 (9th Cir.)

The Third Circuit cases relied on by HEW do not advance its argument and in fact, support Plaintiffs' contention. *A. O. Smith v. F.T.C.*, 530 F.2d 616 (3d Cir. 1976), held that a pre-enforcement challenge based upon the F.T.C.'s lack of power to issue certain regulations was ripe for judicial resolution.

Exxon Corp. v. F.T.C. 588 F.2d 895 (3d Cir. 1978), employing the *Abbott Laboratories'* test, held that a declaratory judgment action even outside of the normal review channels was appropriate to challenge agency action. Plaintiffs' case is even more compelling than those in *Smith* or *Exxon*, both of which were found ripe for judicial consideration.

This Court has jurisdiction to decide the legal issues raised in this proceeding.

IS GROVE CITY COLLEGE BROUGHT UNDER THE COVERAGE OF TITLE IX BY VIRTUE OF ITS STUDENTS' PARTICIPATION IN THE BEOG AND GSL PROGRAMS?

Although it can be reasonably argued otherwise, it is this Court's opinion that Title IX of the Educational Amendments of 1972 apply to Plaintiff Grove City College because the BEOG program (Basic Educational Opportunity Grants), and the GSL program (Guaranteed Student Loan) are Federal financial assistance to the College, and of which assistance the College itself is an ultimate recipient along with the students. See *Bob Jones University v. Johnson* 396 F. Supp 597 (1974) *aff'd* per curiam 529 F. 2d 514 (4th Cir. 1975).

The College and two of said student Plaintiffs, namely, Marianne Sickafuse and Kenneth J. Hockenberry, along with 138 of the College's other students, participate in the BEOG program, which program this Court concludes is covered by Title IX.

The College and three of said student Plaintiffs, namely, Kenneth J. Hockenberry, Jennifer S. Smith and Victor E. Vouga, along with 342 of the College's other students participate in the GSL program which this Court also concludes is covered by Title IX.

Except for the BEOG and GSL programs above referred to, neither the College nor its students participate in any other program or activities which are funded in whole or part by the United States.

Under the BEOG program, the students who attend the College secure Federal funds appropriated by Congress for use in the program directly from the Treasurer of the United States.

Under the GSL program, the Federal Government guarantees the payment of loans and the interest due on said loans made by private lending institutions to students attending the College. Also during the course of said loan, the Government under certain circumstances, makes payments of interest to those lenders.

Upon receipt of either BEOG and/or GSL monies, the student uses his or her grant and/or loan to defray educational costs by direct payment to the College for tuition, food, housing, etc., or by payment to private vendors for such things as books, rent for off-campus housing, etc.

The question now addressed is whether the BEOG program and the GSL program are within the definition of "Federal Financial Assistance" as the term is used in §902 of Title IX, (20 U.S.C. §1681) to mean, in part, "any of the following, when authorized or extended under a law administered by" the Department of Health, Education and Welfare:

"1) A grant or loan of Federal financial assistance, including funds made available for:

(i) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity . . . .

5) Any other contract, agreement or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty."

Such regulations, in §86.2(h) and (i) thereof, define "Recipient" and "Applicant", respectively, to include therein an institution 'to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . . .' (45 C.F.R. 86.2(h) and 'one who submits an application, request or plan required to be approved by' an official of the Department of Health, Education and Welfare, 'or by a recipient, as a condition to becoming a recipient.' (45 C.F.R. 86.2(i))

The College participates indirectly as the final recipient of both Federal BEOG and GSL funds as a student financial aid program funded by the Department of Health, Education and Welfare. Direct grants and loans are made to the students under the BEOG and GSL programs, but the grants and loans are conditioned upon the enrollment of the student at an approved institution of higher education.

HEW contends that signing an Assurance of Compliance is a prerequisite to the continuation of Federal financial assistance provided under the BEOG and the GSL programs and requests that the Federal payments be terminated as to the students using said programs until the College files an Assurance of Compliance. The College defends its refusal to sign the Assurance in part, on the grounds that Federal funds provided for student financial aid are not Federal financial assistance to an education program or activity within the meaning of Title IX, and that the regulations making such student aid programs subject to Title IX exceed HEW's authority under the Act. The College also argues that Title IX as construed and enforced by the Federal regulations is unconstitutional.

This Court finds that payments by HEW under both the BEOG and the GSL programs are Federal financial assistance received by the College under the regulations. (See 45 C.F.R. 86/2(g) (1) (ii) and 86.2(g) (5). They are grants of Federal funds

and/or loans guaranteed by Federal funds either extended to the College for payment to or on behalf of students admitted to the College or extended directly to students for payment to the College. The College is a "recipient" of such Federal financial assistance (See 45 C.F.R. 86.2(h). This financial assistance helps students pay for their education at the College by defraying their costs of tuition, books, room and board and other expenses incurred in attending said institution. Since funds are provided which the College would otherwise have to supply from its own resources, the total funds available to the College to carry on its education programs and activities are increased. The Federal programs such as the BEOG program and the GSL program, also allow students to attend the College who would otherwise not have the financial means to do so, and so enlarge the population on which the College can draw for students. The College contends that the financial assistance given to the College's students under both the BEOG and GSL programs is financial aid extended directly to students and is not financial assistance to the College and so such aid is outside the purview of Title IX, since it is the student who is the "recipient" of such financial assistance and not the College.

The construction of Title IX as adopted in this Opinion, that is, with respect to whether the College is a "recipient" of Federal financial assistance and the definition of "Federal Financial Assistance" itself is authorized and persuasively supported by the case *Bob Jones University v. Johnson*, 306 F. Supp. 597 (D.S.C. 1974), *aff'd per curiam*, 529, F.2d 514 (4th Cir. 1975), a case arising under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et. seq.*) The wording of §901(a) of Title IX, 201 U.S.C. §1681(a). is virtually identical to §601 of Title VI, and it is undeniable that decisions construing Title VI are pertinent to the construction of Title IX.

Bob Jones involved the payment of veterans' benefits to veterans attending Bob Jones University. The University had a policy of denying admission to unmarried nonwhite students and providing for expulsion of students who dated members of any race other than their own. Administrative proceedings were instituted against Bob Jones University after it refused to sign an Assurance of Compliance with Title VI. Following an evidentiary hearing, all VA assistance to Bob Jones University was terminated and the right of veterans assistance was denied to veterans who applied to attend Bob Jones University in the future. 396 F. Supp at 599-600.

The Court held that a University which enrolled students who received direct cash payments under Federal assistance programs for veterans conditioned upon the veterans' pursuit of an approved course of study at an approved educational institution, was a recipient of "Federal Financial Assistance" within the meaning of Title VI. The cash payments received by the veterans in *Bob Jones* were like the student aid extended herein in that they were utilized to meet education expenses including tuition, books, subsistence and equipment costs. The Court, in rejecting the claim that direct payments to students were not covered by Title VI, stated, 396 F. Supp at 601-202:

> "Plaintiffs argue that because the Federal cash payments go directly to the veteran, it is the veteran who is beneficiary of the VA programs, not Bob Jones. The method of payment does not determine the result; the literal language of §601 requires only Federal assistance — not payment — to a program or activity for Title VI to attach. The appropriate questions are (1) whether the federally subsidized veteran participates in a "program or activity", and, if so, (2) whether that program or activity is "receiving Federal financial assistance". The facts in this case project an affirmative answer as to both questions."

The Court found that the payments were not unrestricted grants, but were tied directly to the veterans' participation in an approved education activity, and therefore, *Bob Jones* was conducting a program or activity subject to Title VI. 396 F. Supp at 602. The Court further found that the Federal cash payments did render financial assistance to *Bob Jones'* Education Program. The Federal payments to veterans released institutional funds which would, in the absence of this Federal assistance, have been spent on students. The fact that veterans could enter educational programs because of the availability of Federal funds was also viewed as benefiting *Bob Jones* by enlarging its pool of qualified applicants. 396 F. Supp at 602-603. The Court finally noted that the broad language of Title VI should be interpreted in the remedial context in which it was presented to Congress. Thus, narrow readings of Title VI coverage were found inappropriate. *Id.* at 604.

It can be argued that this case is different from *Bob Jones* because of the fact that payment of benefits under the G.I. Bill in *Bob Jones* was first made directly to the institution and then changed so as to be made to the student while the student aid programs in which the College participates have always involved payments directly to the student. In fact, this distinction was considered irrelevant by the *Bob Jones'* Court which stated the following, 396 F. Supp. at 603-604:

> "Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in either event. To argue otherwise would be to suggest that the applicability of Title VI turns on the role of a university as an exchange. It would hold, for example, that the reach of Title VI extends to the VA Administered Vocational Rehabilitation Act, 29 U.S.C. § 31, since Federal tuition payments are made directly to the

> schools under the Act, but not to the other VA educational benefits statutes because payments under those statutes flow to a university through the veterans. No rational distinction with respect to Title VI coverage can be made on this basis."

In another context, the validity of tuition grants and other aid to students attending private racially segregated schools, under the Equal Protection Clause of the Constitution, the Courts have not adopted the restrictive construction of governmental financial assistance advanced by the College. Cf. e.g., *Brown vs. South Carolina State Board of Education,* 296 F. Supp. 199 (D.S.C. 1968), *aff'd per curiam* 393 U.S. 222 (1968); *Poindexter vs. Louisana Financial Assistance Commission,* 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam* 389 U.S. 571 (1968); *Lee vs. Macon County Board of Education,* 267 F. Supp 458 (E.D. Ala. 1967), *aff'd sub. nom. Wallace vs. United Stated,* 389 U.S. 215 (1967); *Griffin vs. State Board of Education,* 239 F. Supp 560 (E.D. Va. 1965). In *Norwood vs. Harrison,* 413 U.S. 455, 463-464 (1973), a case involving the validity of a state program of lending textbooks to children attending racially segregated private schools, the Court stated:

> "Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves (cases omitted). An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination."

See also, *Committee for Public Education and Religious Liberty vs. Nyquist*, 413 U.S. 756, 784 (1973), where it was held that "the effect of the aid is unmistakably to provide desired financial support for non-public sectarian instructions" when New York State made tuition reimbursement payments to parents, rather than to the schools directly.

There is, of course, one significant difference between *Bob Jones* and the present case. In Bob Jones, discrimination was found in the admission policy of the school which precluded some blacks from ever attending the institution. Thus, all programs and activities of the institution were affected by the discrimination and the termination of tuition payments to the institution was not inconsistent with the provisions of Title VI, 42 U.S.C. 2000d-1, which is similar to §902, of Title IX, 20 U.S.C. 1682, which stipulates that termination shall be limited in effect to the particular program in which noncompliance has been found.

In this case the College is coeducational, and there is no evidence of sex discrimination as discussed in other parts of this Opinion. It is the firm belief of this Court that termination of the BEOG student aid payments and/or the GSL payments is not the proper remedy for coercing the College into filing an Assurance of Compliance where there is no allegation or evidence of sex discrimination, and where the students who are receiving BEOG and GSL benefits will be punished needlessly for no good purposes.

(This Court has been greatly aided in this part of the Opinion by the cogent reasoning of the Administrative Law Judge in the case of *Hillsdale College and State of Michigan*, HEW Docket No. A-7).

DOES THE GSL PROGRAM OF THE COLLEGE INVOLVE "CONTRACTS OF GUARANTY" WHICH CANNOT BE TERMINATED BY HEW AS A MEANS OF ENFORCING HEW'S RULES AND REGULATIONS PERTAINING TO THE ANTI-SEX DISCRIMINATION PROVISIONS OF TITLE IX?

It is concluded by this Court that HEW has no power to terminate the College's GSL program as a means of enforcing its rules and regulations pertaining to the anti-sex discrimination provisions of Section 901 of Title IX.

The Guaranteed Student Loans are obtained from private lenders and are available to students enrolled in eligible educational institutions. An eligible educational institution is generally a public or non-profit institution of higher education (i.e., beyond secondary education), or a vocational school legally authorized by the State to provide a program of education and accredited by a recognized accrediting agency. 45 C.F.R. 177.11. Where the proper showing of financial need is made, the Government in addition to guaranteeing the loan, will also pay the interest on the loan during the time the borrower serves in the armed forces or is unemployed or is attending a graduate or fellowship program. 45 C.F.R. 177.21(b). It can be argued that these interest payments make the program more than a contract of guaranty and bring the entire loan within the purview of the enforcement provisions of Title IX. The payments of interest, however, are not made to the student for payment to the College, nor are they made to the College. They are made to the lender. The only payment made to the student is the loan which we conclude is exempted from termination as a means of enforcing Title IX. The loan itself is disbursed from funds provided by the lender and not, as in the case of the other programs, by the Government. The interest payment appears to be a part of the contract of guaranty with the lender, and to come within the exemption set

forth in Section 902 of Title IX. For concurrence, see the Administrative Proceeding initiated in the Department of Health, Education and Welfare, *In the Matter of Hillsdale College and State of Michigan*, Docket A-7. This Court concludes that the GSL program is exempted from the operation of the enforcement provisions of Section 902 of Title IX specifically by the act itself, and hence, the order of the Administrative Law Judge terminating this program as a means of enforcing HEW regulations is void and is of no legal effect.

IS THE COLLEGE REQUIRED TO EXECUTE AND FILE WITH HEW, THE ASSURANCE OF COMPLIANCE?

Even though participation in the BEOG program and the GSL program brings the College within the substantive provisions of Section 901 of Title IX, it is the conclusion of this Court that the College is not bound to execute and file the Assurance of Compliance form for the reason that said form requires compliance with HEW's regulations subpart E, 45 C.F.R. 86.51 through 86.61, inclusive, which regulations purport to address discrimination on the basis of sex in employment in educational programs and activities sponsored by the College. The HEW regulation, subpart E is an unlawful extension of the statutory authority and legislative purposes of the anti-sex discrimination provisions of the Educational Amendments of 1972, and regulation 45 C.F.R. §86.4, which requires the College to assure its compliance with said unlawful regulations (subpart E) is likewise unlawful and of no legal force or effect as applied in this case.

The College should not be forced to abide by an unlawful and invalid regulation, such as, subpart E and be compelled to assure compliance therewith.

The First Circuit is *Islesboro School Committee v. HEW*, 593 F.2d 424 (1st Cir) *cert denied*, ____ U.S. ____, 100 S. Ct. 467, 62 L. Ed. 2d 387 (1979) has thoroughly addressed this question. We agree with the First Circuit's disposition of the issue and adopt the decision of that Court.

The First Circuit accurately noted that the plain language of §1681(a) does not include employment discrimination, and after a thorough analysis of the legislative history, the First Circuit also determined that the intent of Congress was not to "embrace prohibitions against sex discrimination in employment" via §1681(a). *Id.* at 428.

Because we agree with the First Circuit, and because it has addressed HEW's arguments thoroughly, we decline to add an unnecessary and essentially duplicative discussion of these issues. See also in accord the following cases:

Romeo Community School v. HEW, 438 F. Supp 1021 (E.D. Mich 1977), *aff'd*, 600 F.2d 581 (6th Cir) cert. *denied*, ____ U.S. ____, 100 S. Ct. 467, 62 L. Ed 2d 388 (1979); *Junior College College District of St. Louis v. Califano*, 455, F. Supp 1212 (E.D. Mo. 1978), *aff'd*, 597 F. 2d 119 (8th Cir), *cert. denied*, ____ U.S. ____, 100 S. Ct. 407, 62 L. Ed 2d 388 (1979); *North Haven Board of Education v. Califano*, 19 FEP Cases 1505 (D. Conn. 1979), *appeal pending*, No. 79-6136 (2d Cir.); *Auburn School District v. HEW*, 19 FEP Cases 1504 (D.N.H.) (1979) *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *University of Toledo v. HEW*, 464 F. Supp 693 (N.D. Ohio (1979)); *Board of Education of Bowling Green v. HEW*, 19 FEP Cases 457 (N.D. Ohio, 1979); *Dougherty County School System v. Califano*, 19 FEP Cases 688 (M.D. Ga. 1978), *appeal pending* No. 78-3384 (5th Cir.); *McCarthy v. Burkholder*, 448 F. Supp. 41 (D. Kan. 1978); *Seattle University v. HEW*, 16 FEP Cases 719, (W.D. Wash. 1978), *appeal pending*, No. 78-1746 (9th Cir).

Since the Assurance of Compliance requires that the College abide by all of HEW's Title IX implementing regulations, the College by signing the Assurance, would be bound to abide by subpart E, which has been totally invalidated by a number of cases hereinabove cited. For this reason alone, the College cannot be compelled to sign an Assurance to comply with an unlawful HEW regulation.

WHAT ARE THE RIGHTS OF THE PLAINTIFF STUDENTS IN THIS CASE?

This Court has concluded as a matter of law, that all four of the Plaintiff students were entitled to prior notice and a hearing before their benefits could be lawfully terminated by HEW under the circumstances of this case.

There is no doubt that BEOG and GSL benefits are a matter of statutory entitlement to the four student Plaintiffs. Here it is clear that these four student Plaintiffs will suffer grievous loss if these benefits are terminated. This Court can take judicial notice of the fact that a college education is of inestimable value to a person who is about to enter the labor force of this country. The affidavits of the student Plaintiffs state that they cannot continue going to the College of their choice if the BEOG and/or GSL funds are terminated. This Court can take judicial notice of the fact, and it is undisputed that it is very difficult for students to transfer from one College to another without losing both valuable time and credit for courses of study already taken. It is obvious and beyond argument that important governmental interests are advanced by encouraging our young citizenry to improve their productivity and earning capacity by obtaining some higher education. Clearly it is important to the future of our Nation to bring within the reach of our less economically favored young citizens the same opportunities that are available to the "well-to-do" to participate meaningfully in the life or our country. This Court is of

the opinion that the Constitutional guarantees of due process require a hearing before a student's rights to BEOG or GSL benefits may be terminated as was attempted by HEW in this case. See *Goldberg v. Kelly*, 397 U.S. 254. Further, see §902 of Title IX, (Title 20 U.S.C. §1682) which requires a hearing before termination of Federal financial assistance to any program can occur. Further, due process of law demands that all interested parties should be given prior notice and an opportunity to be heard, before being deprived of educational financial benefits accorded to them by law. See *Goldberg v. Kelly*, cited supra.

DID CONGRESS INTEND TO ALLOW HEW TO TERMINATE A STUDENT'S BEOG AND/OR GSL BENEFITS WITHOUT A SHOWING THAT SEX DISCRIMINATION ACTUALLY EXISTED AT THE INSTITUTION IN QUESTION?

The BEOG and GSL programs and the Title IX legislation were designed and enacted to specifically protect and advance the rights of students only as a matter of sound congressional public policy. In balancing and considering the interests sought to be protected and advanced by each program, the BEOG and/or GSL programs at a College should not be terminated in any case unless and until there is a specific finding of sex discrimination at such College, otherwise an innocent student would be unfairly punished by the loss of his or her BEOG or GSL benefits without receiving any concomitant benefit (i.e. being freed from the unholy effects of sex discrimination). For an example, as in the case at bar, because the College failed to file a form as a matter of conscience, both male and female students, (although total innocent of any wrongdoing) will be irreparably harmed by losing their financial aid, and in a case where there is absolutely no evidence of sex discrimination. Certainly, Congress never intended such an absurd result. Rules of practice, regulations and procedures are devised to promote the ends of justice, not to defeat them. See *Hormel v. Helvering*, 312 U.S. 552, 557.

In discussing Title VI, a parallel provision dealing with racial discrimination, the Court of Appeals for the Fifth Circuit noted that Congress did not intend to terminate Federal financial assistance except as to activities which were actually discriminatory or segregated, and that Congress did not intend to harm innocent beneficiaries of programs (such as the students in the case at bar) not tainted by discriminatory practices.

The Appeals Court is quoted more specifically as follows:

> "The action of HEW in the proceeding below was clearly disruptive of the legislative scheme. The legislative history of 42 U.S.C.A. §2000d-1.
>
> (§602 of the Act) indicates a Congressional purpose to avoid a *punitive* as opposed to a therapeutic application of the termination power. The procedural limitations placed on the exercise of such power were designed to insure that termination would be "pinpoint (ed) * * * to the situation where discriminatory practices prevail." 1964 U.S. Code Cong. & Adm. News, p. 2512. As said by Senator Long during the Senate debate:
>
> "Proponents of the bill have continually made it clear that it is the intent of Title VI not to require wholesale cut-offs of Federal funds from all Federal programs in entire States, but instead to require a careful case-by-case application of the principle of nondiscrimination to those particular activities which are actually discriminatory or segregated." 110 Cong. Rec 7103 (1964)
>
> "(4) It is important to note that the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut-off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices."
>
> See *Board of Public Instruction of Taylor County Florida v. Finch*, 414 F. 2d 1068, 1075.

Again, in the case of *Seattle University v. HEW*, the Court was concerned about enforcing a HEW rule under Title IX that was not being used to protect the rights of the students, but would, in fact, result in harming the very persons it was designed to protect. See 16 FEP Cases 719 at 721, where the Court states:

> "An analysis of 20 U.S.C. §1682 (§902 of Title IX) buttresses the conclusions that (1) employees of an educational institution are not protected persons under §1681, and (2) the prohibitory scope of §1681 is "program specific". First, §1682 grants Federal agencies like HEW, only one method of directly enforcing compliance with Title IX: . . . termination of or refusal to grant or to continue assistance under such program or activity to any recipient (found to be in noncompliance) . . ."
>
> "In the case of employment discrimination, this sanction is of limited enforcement value and has little or no justification, since the funds provided by HEW to create programs and activities which are designed to educate students who participate in them, a cut-off of HEW funding would necessarily *punish* the students. *Punishment of students* in the affected programs is a particularly anomolous result since the sanction is not being imposed for the purpose of enforcing their rights. An ironic result of the imposition of this sanction is that with the program's funding cut-off, the teachers and other employees who staff the program may be laid off. Since it is doubtful that Congress intended to resort to such an arbitrary enforcement measure to protect employee rights, it is similarly doubtful that Congress intended by §1681 to protect employees at all. On the other hand, in a situation where students or other direct beneficiaries of federally funded programs are themselves the victims of discrimination in that program, the cut-off of funds has obvious justification and enforcement value."

In *Romeo Community Schools vs. U.S. Department of Health,* the United States Court of Appeals for the Sixth Circuit was also concerned about causing innocent students to suffer for no good reason in a Title IX situation. The Court of Appeals declared at 600 F.2d 581, 584 (1979):

> "Though the regulation by which HEW seeks to enforce Title IX's prohibition against discrimination speaks of other means authorized by law, it is clear that discontinuance of Federal financial assistance is the means of effecting compliance which is most available to HEW and the primary means contemplated by the enforcement provision contained in §1682. When this sanction is applied one result is that the students who are engaged in the federally funded activities suffer. This may be a reasonable burden for the students to bear when the object is to prevent or put an end to discrimination against students. However, it is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefits of Federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits."

The District Court in the *Romeo Case* was very concerned about weighing the benefits the students received in the Federally financed program against the potential harm of sex discrimination when it noted at 438 F. Supp 1021, 1032 when discussing Title IX as follows:

> "This construction of §1681 is further supported by an analysis of §1682 which defines HEW's enforcement power under the Act. As noted previously, the only sanction permitted under §1682 is a termination of Federal funds to the noncomplying institution. This aid termination provision, quite obviously, is of limited

> enforcement value. Imposition of this sanction will not necessarily compel a delinquent school system to modify or eliminate its descriminatory practices, but will necessarily penalize the students involved or enrolled in affected programs. In a situation where the students themselves are the victims of sex discrimination, it is reasonable to assume that Congress balanced the costs and benefits involved and determined that any benefit which students might derive from the education programs financed by HEW was more than outweighed by the sex discrimination in those programs. A termination of Federal aid under these circumstances has obvious justification."

A fortiori it should be apparent to men and women of reason that Congress did not intend to deprive students of their financial educational benefits where there is no evidence or even an accusation of sex discrimination at the College in question as is the case at bar.

The *Bob Jones* Case does not control this particular aspect of the case at bar. In *Bob Jones* unlike the case at bar on this specific issue, it was admitted as an undisputed fact that the Bob Jones University was openly and avowedly practicing racial discrimination. (See 396 F. Supp 597, 599, 600, 601) Further, students and potential students were the object of racial discrimination in the *Jones Case*. In the *Jones Case* it is clear that any benefit that the student received from the Federal V.A. assistance involved in that case, was more than outweighed by the need and policy of eliminating racial discrimination.

So, in the case at bar, it is the conclusion of this Court that if sex discrimination in student programs had been actually shown to exist at Grove City College, HEW would have had the right and duty to terminate the BEOG student financial assistance program as a sanction. Unlike the situation in *Jones*, there is no evidence of any discrimination of any kind whatsoever at Grove City. Therefore, it is very clear that Congress

could not have intended for HEW to draft and enforce regulations which have the direct effect of depriving hundreds of students from receiving BEOG and GSL benefits under the mantle of implementing Title IX, where there is absolutely no evidence or even an allegation of any sex discrimination of any kind whatsoever to justify punishing the very class of persons that the legislation (Title IX) was designed to protect.

As we reflect on the anomalous result that would occur here in this case if we were to accept HEW's contention that innocent students should be punished for no good or legally sufficient reason relating to the extinguishment of on-going sex discrimination, and merely because their College refused to fill out a regulatory form, we are reminded of the admonition of Alexis deTocqueville, in his Classic, *"Democracy in America"*, where he warned America about the inherent potential for tyranny of the executive power. All three divisions of our system should remember constantly that the price of freedom is eternal vigilance.

CONCLUSION

This Court is holding that both the Basic Educational Opportunity Grant (BEOG) program and the Guaranteed Student Loan (GSL) program in which the Grove City College students participate are Federal financial assistance to said recipient College which brings it, (the College), within the provision of Title IX, and which Title IX protects students from sex discrimination in all College programs.

Although the Guaranteed Student Loan (GSL) is financial assistance that brings Grove City College under the coverage of Title IX of the Educational Amendments Act of 1972, nevertheless, HEW, pursuant to the express terms of Section 902 of Title IX, is forbidden from terminating the GSL financial assistance to the Plaintiff students as a means of enforcing the anti-sex discrimination provisions of Section 901,

Title IX, because this Court finds as a matter of law that the GSL program is a contract of guaranty. It is unlawful for HEW to terminate an education program or activity aided by financial assistance from the Federal Government which involves a contract of guaranty, in order to enforce compliance with any HEW rule or regulation pertaining to the anti-sex discrimination provisios of Title IX. Even though a GSL program is financial assistance that brings a College under the coverage of Title IX, compliance with said Title must be effectuated, if any enforcement activity is indicated by "other means authorized by law". (See Section 902 subparagraph 2 of Title IX).

This Court is holding that HEW may not lawfully demand that the College execute an Assurance of Compliance with Title IX (HEW Form 639) because said form presently improperly requires the College to abide by the implementing regulations of subpart E, which subpart E relates to whether there is sex discrimination in the College's employment policies. This Court is now holding that HEW by promulgating regulations subpart E, has exceeded the authority granted to it by Congress, and the subpart E regulations are void and of no legal effect.

This Court is not holding that the College is totally exempted from an obligation to execute an Assurance of Compliance under all circumstances. For an example, the College may be properly required to execute such an Assurance if all references to subpart E were excluded from the form, and if the College continues to receive Federal financial assistance of some kind, such as, the BEOG and GSL programs.

This Court is holding that HEW, under no circumstances, can use the sanction of terminating a student's Federal financial assistance (BEOG, for an example) because of the failure of the College to comply with Title IX and/or its implementing regulations unless and until there is a showing of actual sex discrimination involving student programs at the College.

A situation may arise where a BEOG program and/or GSL program is in effect and the College refuses to sign a revised and properly drafted Assurance of Compliance upon request of HEW, and in an instance where there is no available proof of actual sex discrimination in student programs at the College.

As to that hypothetical situation, this Court offers no opinion as to what other legal sanctions, if any, are available to HEW for use against the College. However, it is again repeated that the sanction of terminating BEOG and/or GSL and/or other student financial assistance benefits is not available to HEW in the hypothetical case just hereinbefore related because in the hypothetical case there is no evidence indicating actual sex discrimination in student programs at the College.

AMENDED ORDER

AND NOW, this 26th day of June, 1980, for the reasons hereinbefore set forth, this Court makes the following Order:

IT IS ORDERED that Roma J. Stewart shall be substituted as a Defendant in this case in place of David Tatel, inasmuch as Roma J. Stewart is now the Director of the United States Office for Civil Rights.

The caption of this case shall now read:

Amended Opinion and Order of the District Court, June 26, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GROVE CITY COLLEGE, individually and on behalf of its students, MARIANNE SICKAFUSE, KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Plaintiffs

vs.

PATRICIA HARRIS, Secretary of the United States Department of Health, Education and Welfare; ROMA J. STEWART, Director of the United States Office for Civil Rights,

Defendants.

CIVIL ACTION NO. 78-1293

IT IS ORDERED that Defendants' Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that HEW Form 639A, as drafted, in July of 1976, is invalid, void and of no effect whatsoever.

IT IS FURTHER ORDERED that the Defendants, and/or their successor administrators of the statutes, laws and regulations herinbefore and hereinafter referred to, their agents, employees and persons acting in concert with them are permanently enjoined from doing any of the following:

1. From using HEW Form 639A as the same is presently composed and drafted.

2. From terminating or refusing to grant or attempting to terminate or refusing to grant to any or all of the Plaintiffs Federal financial assistance under the Federal Basic Education Opportunity Grant Program, for any alleged noncompliance with Title IX, and/or the regulations promulgated therewith unless and until sex discrimination involving either admission and recruitment and/or educational programs and educational activities as the same pertain to students only, has been properly proved at a full administrative hearing with full and adequate notice to all persons who may be immediately and adversely affected by said proceeding, and

3. From terminating at any time the Guaranteed Student Loan Program now and/or formerly in effect at Grove City College for any noncompliance and/or any alleged noncompliance with Title IX and/or the regulations promulgated therewith.

/s/ Paul A. Simmons
United States District Judge

INITIAL DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE FOR THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SEPTEMBER 15, 1978.

ADMINISTRATIVE PROCEEDING
IN THE
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

IN THE MATTER OF
GROVE CITY COLLEGE

(HEREINAFTER "RESPONDENT INSTITUTION")

AND

COMMONWEALTH OF PENNSYLVANIA

(HEREINAFTER "RESPONDENT STATE AGENCY")

DOCKET NO. A-22, INITIAL DECISION

COMPLIANCE PROCEEDING PURSUANT TO TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND IMPLEMENTING REGULATIONS ISSUED THEREUNDER

DECISION

PRELIMINARY STATEMENT

This action was brought under Title IX of the Education Amendments of 1972, 20 USC §1681 et. seq., and the Regulations of the Department of Health, Education and Welfare (45 C.F.R. Part 86, 45 C.F.R. Parts 80 and 81).

It was alleged:

> That Grove City College, hereinafter referred to as "respondent institution" or "the college", either receives, has applied for, or is eligible to apply for Federal financial assistance for its program of Post Secondary Education from the Commonwealth of Pennsylvania and directly ... the Department of Health, Education and Welfare under one or more Acts of the Congress administered by said Department. The college has not submitted to the Department an adequate assurance of compliance with Title IX and its implementing regulations as required by such regulations although it has received timely notice that its failure to do so is in violation of the Regulations and despite the attempt by the Office of Civil Rights, Department of Health, Education and Welfare to obtain compliance. So long as the college fails to submit such assurance of compliance, it is in violation of Title IX and is not eligible to receive the Federal financial assistance described in the Notice.

General Counsel prayed for, in part, an Order terminating, refusing to grant or to continue, and finding respondent college ineligible to receive Federal financial assistance which is administered by the Department directly to the college or through the State agency. The prayer further sought an Order that such termination of or refusal to grant or continue or such ineligibility to receive Federal financial assistance should remain in force until the college satisfies the Director of the Office of Civil Rights that it has complied with the requirements of Title IX of the Education Amendments of 1972 and that it is providing assurance that it will comply in the future fully with all applicable requirements of Title IX and the implementing regulations of Health, Education and Welfare.

Respondent college denied every allegation of the Notice of Hearing and in addition filed additional defenses thereto which included an allegation that the college receives no Federal

financial assistance through Health, Education and Welfare and that Health, Education and Welfare lacks jurisdiction under Title IX of the Education Amendments of 1972, 20 USC §1681 et. seq. to proceed. In addition, there was a challenge to the venue which was changed from the City of Atlanta, Georgia to Philadelphia, Pennsylvania in response to such challenge.

A hearing was held in Philadelphia, Pennsylvania on March 10, 1978, at 9:00 a.m. before Administrative Law Judge Albert P. Feldman, who had been selected by the Civil Service Commission, and was authorized by the chairman of the reviewing authority (Civil Rights), Department of Health, Education and Welfare, to conduct the hearing. Movant was represented by Ms. Barbra Shannon, Allen McDonogh, each of the Office of General Counsel, Region IV, and Fred Marinucci, Office of the Regional Attorney, Philadelphia, Pennsylvania. The respondent college was represented by John B. McCrory.

Witnesses who testified where Howard Bennett, Office of Civil Rights, Health, Education and Welfare; Calixto Marquez, Health, Education and Welfare; and Charles McKenzie, President of Grove City College. In addition, Harriette B. Kuryk, Office of General Counsel, and counsel of record in the case, responded to questions proponded by the Administrative Law Judge to her in her place.

EVALUATION OF THE EVIDENCE AND RATIONALE

The evidence was limited to the Basic Education Opportunity Grant and to the Guaranteed Student Loan, hereinafter sometimes referred to as BEOG and GSL.

The most important evidence in the record, in the opinion of the Administrative Law Judge, is the agreement regarding institutional participation in the guaranteed student loan program, dated July 15, 1975, and signed by President McKenzie of the Grove City College with an implementation

date shown thereon of September 1, 1975. President McKenzie stated in a letter to the Office of Education, Department of Health, Education, and Welfare, dated July 15, 1975, that the college might want to reconsider their participation in both the program as a whole and the agreement in particular. He stated that any withdrawal would occur only under conditions which might give a complete assurance of proper usage of any Federally supplied student loan monies received to that point in time and that the agreement was contingent on any change of status which might occur in the future.

Although the exhibits are limited in number, they are voluminous in size. Therefore, they will not all be recited, nor will the record of the hearing be recited. The evidence shows that students have, in fact, received loans under Federally financed programs. The evidence shows that the college has aided the students in applying for these loans.

The record is replete with records of students enrolled at Grove City College who are receiving student loans.

A substantial portion of the revenue of the college comes from students who receive Federally financed student loans.

While the evidence has been set forth in very brief fashion, certain facts are very evident from the record. The president of the college did enter into an agreement under the guaranteed student program and the college did act under that agreement. It is not reasonable to urge that while aiding the students to obtain loans, the funds from which are either paid to the college or are used to restore the funds which were paid to the college for educational purposes, the college did not receive financial assistance from Federally financed loans.

It appears from the evidence that what is involved is not a contract of insurance or guaranty such as to be subject to the exception of the contract of insurance or guaranty as set forth in §86.2 (g)(5) of the regulations. The evidence shows that the Government not only guarantees the payment of the student loans, but also the Government undertakes and pays interest on the loans to the lender while the student is in school. This would seem to remove this contract from being a contract of insurance or guaranty. The obligation of the Government is more that of a principal than that of an insuror or guarantor.

The decision of the Administrative Law Judge in the matter of Hillsdale College and the State of Michigan, an administrative proceeding in the Department of Health, Education, and Welfare, Docket Number A7, submitted by counsel for the respondent college raised a number of questions, which have been resolved.

Section 86.4 of the Regulations, Assurance Required, shows in Section (a):

> "(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with Section 86.3 (a) to eliminate existing discrimination on the basis of sex, or to eliminate the effects of past discrimination whether occuring prior or subsequent to the submission to the Director of such assurance."

> "(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's, or recipient's, subgrantees, contractors, subcontractors, transferees, or successors in interest."

It is appropriate at this point to call attention to the statement shown on the title page of the Grove City College Bulletin (Ex. D4) to wit:

> "NOTICE OF NON-DISCRIMINATION POLICY"
>
> Grove City College, a private educational institution, admits students of any race, color, sex, religion, and national or ethnic origin to all of the rights, privileges, programs, and activities generally accorded or made available to students at the College. Grove City College does not discriminate on the basis of race, color, sex, religion, and national or ethnic origin in the administration of its educational programs, admission policies, scholarship and loan programs, athletics co-curricular activities or other College-administered programs."

This is a notice to anyone who cares to look that the college has a policy of non-discrimination.

It should also be noted that there was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief.

There is, very clearly, given to the Director total and unbridled discretion to require any certificate of compliance that he may desire, whether the same be reasonable, or, to reasonable men, unreasonable. There are no guidelines. There is no necessary continuity, as from one Director to a successor Director whose opinions as to what constituted compliance might be totally different from those of his predecessor.

The Administrative Law Judge is not persuaded by any of the cases cited that this authority in the Regulations has been struck down. Under the circumstances, the Regulations being binding upon the Administrative Law Judge, he must rule in accordance therewith. The Director is given unlimited discretion so that the Administrative Law Judge has no authority to rule and is powerless to rule either that the regulations are unconstitutional or that the regulations exceed the statutory authority.

Section 86.2 of the Regulations, Definitions, shows in Subparagraph (g);

> " 'Federal financial assistance' means any of the following, when authorized or extended under a law administered by the Department: (1)(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity."

Under all of the evidence and under the definition of Federal financial assistance as set forth in the Regulations, there can be no question that the respondent college does in fact receive such Federal financial assistance.

All findings of fact requested to be made which are not included in the following findings of fact are hereby denied.

The agreement between movant and the Commonwealth of Pennsylvania has been approved.

FINDINGS OF FACT

1. Grove City College is a coeducational institution of higher education.
2. The Department of Health, Education and Welfare attempted to obtain an executed assurance of compliance with Title IX, which same was HEW Form 639a.

3. The respondent college has failed and refused to submit an executed assurance of compliance.
4. The Office of Civil Rights has made extensive efforts to secure voluntary compliance but has been unable to do so.
5. During the academic year 1977-78, students enrolled in and attending Grove City College were extended Federal financial assistance for payment to the college.
6. The proceeds of loans under these programs are for the purposes of defraying education costs.
7. Receipts from these loans at Grove City College are paid to the said college to defray education expenses.
8. The respondent institution did agree to participate in the GSL Program.
9. The respondent college has regularly performed administrative functions to insure that its students receive loans under the GSL Program.
10. The respondent college has received financial benefits from its participation in these programs.

ORDER

IT IS HEREBY ORDERED:

1. Federal financial assistance administered by the Department of Health, Education and Welfare under the following authorization is to be terminated and refused to be granted to the Respondent Institution:

a. Basic Education Opportunity Grant Program, 20 U.S.C. §1070a.

b. Guaranteed Student Loans Progam, 20 U.S.C. §1071 *et seq.*

2. Additional Federal financial assistance which the Respondent Institution would be eligible to receive, either from the Department or through the Commonwealth of Pennsylvania, but for its noncompliance with Title IX, is to be refused to be granted.

3. This termination and refusal to grant or continue Federal financial assistance shall remain in force until the Respondent Institution corrects its noncompliance with Title IX and satisfies the Department that it is in compliance.

4. This Initial Decision and Order shall become final unless, within 20 days after mailing of the Initial Decision and Order, either party submits exceptions to the Reviewing Authority in accordance with 45 C.F.R. §81.102.

/s/ Albert P. Feldman
Administrative Law Judge

Date: September 15, 1978

This is to certify that I have today served copies of the within decision upon the parties shown below by mail:

This 15th day of September, 1978.

Mr. John B. McCrory
Nixon, Hargrave, Devans & Doyle
P.O. Box 1027
Rochester, New York 14603

Mr. Jack E. Solomon
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Mr. F. Allen McDonogh
Ms. Barbra R. Shannon
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101 Marietta Tower
Atlanta, Georgia 30323

Mr. Richard Slippen, Hearing Clerk (Civil Rights)
Department of Health, Education and Welfare
Room 503 F
Hubert Humphrey Building
200 Independent Avenue, S.W.
Washington, D.C. 20201

/s/ Albert P. Feldman
Administrative Law Judge

JUDGMENT OF THE COURT OF APPEALS, AUGUST 12, 1982.

Judgment of the Court of Appeals,
August 12, 1982.

United States Court of Appeals
for the Third Circuit

No.s 80-2383/84

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Appellant in No. 80-2383

vs.

SHIRLEY M. HUFSTEDLER, Secretary of the United States Department of Education; CYNTHIA G. BROWN, Assistant Secretary of the United States Office for Civil Rights,

Appellants in No. 80-2384

(D.C. Civil No. 78-1293)

Judgment of the Court of Appeals,
August 12, 1982

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GARTH and BECKER, *Circuit Judges;* and MUIR, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on June 21, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 26, 1980, be, and the same is hereby reversed insofar as it is inconsistent with the opinion of this Court and the cause remanded to the said District Court for the entry of an appropriate order consistent with the opinion of this Court. Costs taxed against Grove City College as appellant in C.A. No. 80-2383 and as appellee in C.A. No. 80-2384.

ATTEST:
Sally Mrvos
Clerk

August 12, 1982

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* Honorable Malcolm Muir, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EDUCATION AMENDMENTS OF 1972, TITLE IX.

20 U.S.C. §1681. Prohibition against sex discrimination — Exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [enacted June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits student of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 [26 USCS §501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

(7) this section shall not apply to—

(A) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference, or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number of percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title [20 USCS §§1681 et seq.; 29 USCS §§203, 213; 42 USCS §§2000c, 2000c-6, 2000c-9, 2000h-2] of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title [20 USCS §§1681 et seq.] an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(June 23, 1972, P.L. 92-318, Title IX, §901, 86 Stat. 373; Dec. 31, 1974, P.L. 93-568, §3(a), 88 Stat. 1862; Oct. 12, 1976, P.L. 94-482, Title IV, §412, 90 Stat. 2234.)

20 U.S.C. §1682. Federal administrative enforcement

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 [20 USCS §1681] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(June 23, 1972, P.L. 92-318, Title IX, §902, 86 Stat. 374.)

TITLE 45 C.F.R. PART 86 — NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A — Introduction

45 C.F.R. §86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93-568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93-380)

45 C.F.R. §86.2 Definitions.

As used in this part, the term —

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health and Human Services.

(c) *"Secretary"* means the Secretary of Health and Human Services.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion therof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

45 C.F.R. §86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

Subpart B — Coverage

45.C.F.R. §86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

Subpart C — Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§86.16 and 86.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex

as remedial action pursuant to §86.3(a), and may choose to undertake such efforts as affirmative action pursuant to §86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart D — Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

45 C.F.R. §86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives of benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for instate fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686).

* * *

45 C.F.R. §86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this

regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

* * *

45 C.F.R. §86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for

such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §86.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 24128, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

45 C.F.R. §86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

45 C.F.R. §86.41 Athletics

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

ASSURANCE OF COMPLIANCE WITH TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND THE REGULATION ISSUED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE IN IMPLEMENTATION THEREOF.

(HEW Form 639)

[PLEASE READ EXPLANATION OF HEW FORM 639 BEFORE COMPLETING THIS DOCUMENT]

Pursuant to 45 C.F.R. §86.4, _____
(insert name of Applicant or Recipient)
_____ (hereinafter the "Applicant") gives this

assurance in consideration of and for the purpose of obtaining Federal education grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Health, Education and Welfare (hereinafter the "Department"), including payments or other assistance hereafter received pursuant to application approved prior to the date of this assurance.

ARTICLE I — TYPE OF INSTITUTION SUBMITTING ASSURANCE

The Applicant is (check the following boxes where applicable):

[ ] A state education agency.
[ ] A local education agency.
[ ] A publicly controlled educational institution or organization.
[ ] A privately controlled educational institution or organization.
[ ] A person, organization, group or other entity not primarily engaged in education. If this box is checked, insert primary purpose or activity of Applicant in the space provided below:

[ ] Claiming a religious exemption under 45 C.F.R. §86.12(b). (If religious exemption is claimed, attach statement by highest ranking official of Applicant identifying the specific provisions of 45 C.F.R. Part 86 which conflict with a specific religious tenet of the controlling religious organization.)

The Applicant offers one or more of the following programs or activities (check where applicable):

[ ] Pre-school
[ ] Kindergarten
[ ] Elementary of Secondary
[ ] Graduate
[ ] Other (such as special programs for the handicapped even if provided on the pre-school, elementary or secondary level). If this box is checked, give brief description below:

[ ] Undergraduate (including junior and community college)
[ ] Vocational or Technical
[ ] Professional

ARTICLE II — PERIOD OF ASSURANCE

This assurance shall obligate the Applicant for the period during which Federal financial assistance is extended to it by the Department.

ARTICLE III — TERMS AND CONDITIONS

The Applicant hereby agrees that it will:

1. Comply, to the extent applicable to it, with Title IX of the Education Amendments of 1972 (R.L. 92-318), as amended, 20 U.S.C. §1681, 1682, 1683, and 1685 (hereinafter, "Title IX"), and all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX, 45 C.F.R. Part 86 (hereinafter, "Part 86"), to the end that, in accordance with Title IX and Part 86, no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any education program or activity for which the Applicant receives or benefits from Federal financial

assistance from the Department. (This assurance does not apply to sections 904 (prescribing denial of admission to course of study on the basis of blindness) and 906 (amending other laws) of Title IX, 20 U.S.C. 1684 and 1686).

2. Require any person, organization, group or other entity to which it subgrants or with which it contracts, subcontracts or otherwise arranges to provide services or benefits or to assist it in the conduct of any program covered by this assurance, or with which it contracts or otherwise arranges for the use of any facility covered by this assurance to comply fully with Title IX and Part 86 and to submit to the Department an assurance satisfactory to the Director, Office for Civil Rights (hereinafter, the "Director"), to that effect.

3. Make no transfer or other conveyance of title to any real or personal property which was purchased or improved with the aid of Federal financial assistance covered by this assurance, and which is to continue to be used for an education program or activity and where the Federal share of the fair market value of such property has not been refunded or otherwise properly accounted for to the Federal government, without securing from the transferee an assurance of compliance with Title IX and Part 86 satisfactory to the Director and submitting such assurance to the Department.

4. Submit a revised assurance within 30 days after any information contained in this assurance becomes inaccurate.

5. If the Applicant is a state education agency, submit reports in a manner prescribed by the Director under 45 C.F.R. §80.6(b) as to the compliance with Title IX and Part 86 of local education agencies or other education programs or activities within its jurisdiction.

Assurance of Compliance with Title IX of the Education Amendments of 1972 (HEW Form 639)

GRIEVANCE PROCEDURES

(Check the appropriate box.)

[ ] Pursuant to 45 C.F.R. §86.8, the Applicant has adopted grievance procedures and designated the following employee to coordinate its efforts to comply with Part 86 and has notified all of its students and employees of these grievance procedures and the following name, address, and telephone number of the designated employee:

_____

(name of employee)

_____

(office address)

_____

(telephone number)

[ ] The Applicant is not presently receiving Federal financial assistance subject to Part 86 and, consequently, has not designated a responsible employee or adopted grievance procedures pursuant to 45 C.F.R. §86.8 but will do so immediately upon award of such assistance and will immediately notify the Director, its students and employees of the name, office address, and telephone number of the employee so designated.

ARTICLE V — SELF EVALUATION

(Check the appropriate box.)

[ ] The Applicant has completed a self-evaluation as required by 45 C.F.R. §86.3(c) and has not found it necessary to modify any of its policies or to take any remedial steps to come into compliance with Part 86.

Assurance of Compliance with Title IX of the Education Amendments of 1972 (HEW Form 639)

[ ] The Applicant has completed a self-evaluation as required by 45 C.F.R. §86.3(c) and has ceased to carry out any policies and practices which do not or may not meet the requirements of Part 86 and is taking any necessary remedial steps to eliminate the efforts of any discrimination which resulted or may have resulted from adherence to such policies and practices.

[ ] The Applicant has not completed the self-evaluation required by 45 C.F.R. §86.3(c) but expects to have it completed by _____.
(insert date)

[ ] The Applicant is not required to conduct a self-evaluation under 45 C.F.R. §86.3(c) since it did not receive any Federal financial assistance to which Part 86 applies prior to July 21, 1976.

_____
(Insert name of Applicant)

Date: _____

By

_____
(This document must be signed by an official legally authorized to contractually bind the Applicant.)

_____
(Insert title of authorized official.)

EXPLANATION OF HEW FORM 639, ENTITLED "ASSURANCE OF COMPLIANCE WITH TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 AND THE REGULATION OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE IN IMPLEMENTATION THEREOF."

Section 901 of Title IX of the Education Amendments of 1972 provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. Section 902 of Title IX authorizes and directs the Department of Health, Education, and Welfare (hereinafter the "Department") to effectuate the nondiscrimination requirements of section 901 by issuing rules, regulations, and orders of general applicability. Pursuant to section 902, the Department has issued 45 C.F.R. Part 86 (hereinafter "Part 86") which became effective on July 21, 1975.

Section 86.4 of Part 86 requires that every application for Federal financial assistance for any education program or activity shall, as a condition of its approval, contain or be accompanied by an assurance from the applicant satisfactory to the Director of the Office for Civil Rights (hereinafter the "Director") that each education program or activity operated by the applicant and to which Title IX of the Education Amendments of 1972 and Part 86 apply will be operated in compliance with Part 86.

Section 86.4 also provides that the Director will specify the form of the assurance required and the extent to which such assistance will be required of the applicant's subgrantees, contractors, subcontractors, transferees, or successors in interest. Under this authority, HEW Form 639 has been specified as the form of assurance which shall apply to all recipients of and applicants for Federal financial assistance subject to the provision of Title IX and awarded by the Department.

Explanation of HEW Form 639

HEW Form 639 constitutes a legally enforceable agreement to comply with Title IX and all of the requirements of Part 86. Applicants are urged to read Part 86 and the accompanying preamble. The obligation imposed by Title IX and Part 86 are independent of, and do not alter, the obligation not to discriminate on the basis of sex imposed by Title VII of the Civil Rights Act of 1964 (20 U.S.C. §2000e et seq.): Executive Order 11246, as amended; section 799A and 855 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); and the Equal Pay Act (29 U.S.C. 206 and 206 (d)).

PERIOD OF ASSURANCE

HEW Form 639 is binding on a recipient for the period during which Federal financial assistance is extended to it by the Department. With respect to Federal financial assistance used to aid in the purchase or improvement of real or personal property, such period shall include the time during which the real or personal property is used for the purpose of providing an education program or activity. A recipient may transfer or otherwise convey title to real and personal property purchased or improved with Federal financial assistance so long as such transfer or conveyance is consistent with the laws and regulations under which the recipient obtained the property and it has obtained a properly executed HEW Form 639 from the party to whom it wishes to transfer or convey the title unless the property in question is no longer to be used for an education program or activity or the Federal share of the fair market value of such property has been refunded or otherwise properly accounted for to the Federal government.

An applicant or recipient which has submitted an HEW Form 639 to the Director need not submit a separate form with each grant application but may, if the information contained therein remains accurate, simply incorporate by reference the HEW Form 639 already submitted giving the date it was

submitted. On the other hand, a revised HEW Form 639 must be submitted within 30 days after information contained in the submitted form becomes inaccurate, even if no additional financial assistance is being sought.

OBLIGATION OF RECIPIENT TO OBTAIN ASSURANCES FROM OTHERS

If a recipient subgrants, contracts, or otherwise utilizes an individual, organization, or group to assist in the conduct of an education program or activity receiving Federal financial assistance from the Department or to provide services in connection with such a program or activity, the recipient continues to have an obligation to insure that the education program or activity is being administered in a nondiscriminatory manner. Accordingly, the recipient must make sure that the individual, organization, or group in question is complying with Title IX and Part 85 and must secure a properly executed HEW Form 639 to that effect. Similarly, if the recipient leases to another person or organization a facility which was provided or improved with the aid of Federal financial assistance awarded by the Department, and the recipient is still using the facility as part of an education program or activity, it has an obligation to make sure the lessee is complying with Title IX and Part 85 and must secure a properly executed HEW Form 639 from the lessee. For example, if a university owns a gymnasium constructed with the aid of Federal financial assistance from HEW and leases the facility to a private entrepreneur for use in conducting drama classes open to the general public, then the university must secure a properly executed HEW Form 639 from the entrepreneur sponsoring the classes.

Explanation of HEW Form 639

ADMINISTRATIVELY SEPARATE UNITS

If an educational institution is composed of more than one administratively separate unit, a separate HEW Form 639 may be submitted for each unit or one may be submitted for the entire institution. If separate forms are submitted, the administratively separate unit for which the form is submitted should be clearly identified on the first line of HEW Form 639. An "administratively separate unit" is defined as a school department or college of an educational institution (other than a local education agency) admission to which is independent of admission to any other component of such institution. See 45 C.F.R. §86.2(o).

STATE EDUCATION AGENCIES

State education agencies are generally not responsible for running pre-school, kindergarten, elementary, or secondary programs. Such responsibility is generally left to local education agencies although some supervisory authority may be vested with the state education agency. Consequently, most state agencies should not check the boxes for: "Pre-school," "Kindergarten," or "Elementary or Secondary" in Article I of HEW Form 639. If the state agency runs special programs for the handicapped, including those on the pre-school, kindergarten, elementary, or secondary level, the box marked "Other" should be checked and the appropriate description inserted in the space provided.

Under Article III, paragraph 5, of HEW Form 639, a state education agency may be called upon from time to time to submit reports necessary to determine Title IX compliance by local education agencies within its jurisdiction. The form and content of such reports will be specified by the Director at the time the request is made.

LETTER FROM ASSISTANT ATTORNEY GENERAL WM. BRADFORD REYNOLDS TO CLARENCE M. PENDLETON, JR., CHAIRMAN OF THE U.S. COMMISSION ON CIVIL RIGHTS, DATED SEPTEMBER 16, 1982.

Office of the Assistant Attorney General
Washington, D.C. 20530

September 16, 1982

Mr. Clarence M. Pendleton, Jr.
Chairman
U.S. Commission on Civil Rights
Washington, D.C. 20425

Dear Fenny:

Out of an abundance of caution, the Attorney General has determined that, because of his prior membership on the Board of Regents of the University of California, he should recuse himself from participation in the *University of Richmond* case. I have, therefore, been asked to respond to your August 10 letter inquiring about a possible appeal from the *Richmond* decision.

As you know, the Department of Education (DOEd) and the Department of Justice (DOJ) agreed not to seek appellate review of Judge Warriner's ruling that DOEd lacked authority under Title IX of the Educational Amendments Act of 1972, and its implementing regulations, to investigate Richmond's athletic program. In reaching this conclusion, the views set forth in your August 10 letter were fully considered. While we found ourselves in disagreement with your recommended course of action on this occasion, the wise counsel of the Civil Rights Commission is always valued and we trust that you will continue to share your thoughts and analysis with us on future issues of similar importance.

In *Richmond*, we were guided principally by the particulars of the case before us and Judge Warriner's application of existing law to the stipulated facts. The University's athletic program admittedly received no direct federal financial assistance. Nor did DOEd seek to initiate its investigation on the claim that the athletic program was receiving federal funding indirectly. Rather, the jurisdictional nexus for sending federal agents onto Richmond's campus was tied solely to the fact that the University received federal funds through student financial aid programs (i.e., Basic Educational Opportunity Grants; Supplementary Educational Opportunity Grants; Student Worker Wages; Guaranteed Student Loans) and through a single Library Grant.

The position advanced by the then director of DOEd's Office of Civil Rights, and rejected by the district court, was that receipt by Richmond students of even a single dollar of federal funds is sufficient to subject all of the University's programs and activities to Title IX scrutiny — even those programs and activities that receive no federal funds. This interpretation of the statute effectively removes from Title IX the "program specificity" feature that was recognized as an essential component of the legislation in the Supreme Court's decision last Term in *North Haven Board of Education* v. *Bell*, 50 U.S.L.W. 4501 (1982). As there stated: "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902. 50 U.S.L.W. at 4507.

In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found Judge Warriner's opinion to be both analytically and legally sound. Its conclusion that only those University programs and activities shown to be recipients of federal funds are within the reach of Title IX is fully consistent

with the better reasoned judicial precedents in the area. *See Rice* v. *President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981); *Bennett* v. *West Texas State University*, No. 280-0073-f (N.D. Tex., July 27, 1981); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981).

On this last point, the two recent Third Circuit decisions to the contrary have neither been ignored nor lightly dismissed. See *Grove City Community College* v. *Bell*, No. 81-0406 (July 8, 1982); *Haffer* v. *Temple University*, No. 82-1049 (September 7, 1982). Dictum in *Grove City*, which another Third Circuit panel considered to be controlling in *Temple*, states that the University as a whole can be considered the "program" for the purpose of Title IX coverage once at least one dollar of federal educational funds goes to any student enrolled at the school. In seeking to ascertain from the statute's language and history whether or not Congress intended so expansive an interpetation of the phrase "program or activity," we were satisfied that Judge Warriner's opinion in *Richmond* had the best of it. Accordingly, there was, in the opinion of both DOEd and DOJ, no cause for an appeal of *Richmond* to the Fourth Circuit.

I would in closing add only that this "no appeal" decision suggests no retrenchment of our enforcement responsibilities under Title IX — as some in the political arena have been quick to assert. The *Richmond* opinion in no way tolerates sex discrimination in federally funded programs; nor does it allow DOEd to ignore its Title IX investigatory responsibilities upon receipt of a complaint containing factual allegations of sex bias in a directly aided program. Moreover, if gender-based discriminatory behavior so pervades a nonfunded program that it "infects" a funded program, we read Judge Warriner's opinion as recognizing a DOEd investigatory responsibility in such circumstances.

It is primarily in this respect that we had some differences with your August 10 letter. The "far-reaching" implications that you hypothesized might perhaps flow from the *Richmond* ruling do not, as we read the opinion, follow from the program-specific analysis used by the district court. That DOEd must make a showing that the program or activity to be investigated is indeed a recipient of federal funds seems to us to be neither inappropriate nor unduly burdensome.

I hope that the above discussion satisfactorily explains our decision not to appeal the *Richmond* decision. If you have further questions, we can perhaps further discuss this matter on your next trip to Washington.

Sincerely,

/s/ WM. BRADFORD REYNOLDS
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: John Hope III

Office-Supreme Court, U.S.
FILED
JUN 11 1983
ALEXANDER L. STEVAS,

82-792

No. 82-792

In The

Supreme Court of the United States

October Term, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

JOINT APPENDIX

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Petition for Certiorari filed November 9, 1982
Certiorari granted February 22, 1983

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In The

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GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKER; PERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

JOINT APPENDIX

CIVIL ACTION DOCKET SHEET.

CA-78-1293

DATE	NR.	PROCEEDINGS:
1978		
Nov. 13	1	Complaint filed.
Nov. 33	—	Summons issued.
Dec. 8	2	Summons returned served 11/24/78 on David Tatel by cert. mail; Califano 11/22/78 by cert. mail.
1979		
Jan. 22	3	Motion for enlargment of time filed with proposed order thereon.

Civil Action Docket Sheet

Jan. 23 w/3 ORDER entered directing time for defendants to answer, move or otherwise respond to complaint enlarged to 3/22/79 (Simmons J)

Mar. 26 4 ANSWER Filed.

June 11 5 Order entered June 7, 1979 directing that a Status Conf. will be held on this Case on Aug 13, 1979 at 10:30 A.M. before Judge Simmons (Simmons, J.)

June 13 6 Pretrial notice filed (Simmons, J.)

July 6 7 Notice resetting status conference to 9/13/79 at 2:30 PM (Simmons, J.)

Aug. 6 7A Motion for judgement on the pleadings filed and ORDER

Aug. 23 8 ORDER entered directing argument 9/13/79 at 2:30 PM (Simmons, J.)

Sept. 4 9 Motion to continue hearing filed with proposed order thereon.

Oct. 15 w/9 ORDER entered directing hearing on plfs' motion for judgment on pleadings continued 10 11/13/79 at 4:00 PM (Simmons, J.)

Nov. 8 10 Motion for summary judgment filed with proposed order thereon, together with administrative record

Nov. 14 11 Hearing held on all motions before Simmons, J. and concluded CAV. Memo filed (Rep. Goodworth)

Dec. 12 12 Transcript of proceedings held (Rep. Goodworth)

1980

March 10 13 Preliminary statement findings of fact, conclusions of law, discussion and order entered directing Plaintiffs' motion for summary judgment granted; further ordered that HEW form 639A as drafted in July 1976 invalide, void and of no effect; further ordered defendants,

agents, employees and persons acting in concert with them are permanent enjoined from doing any of following as further stated; further ordered that plfs. and defendants granted period of 10 days from receipt of these findings of fact, conclusions of law and order to take exception to same. If exceptions filed court will set up briefing schedule and date for argument on same within 10 days thereafter (Simmons, J.)

March 21 14 Defendants' exceptions to findings of fact, conclusions of law and order filed

Mar. 25 15 Exception to opinion of the Court filed by pltfs.

May 2 16 Hearing held on def's motion of exceptions and concluded CAV before Simmons, J., Memo filed (Rep. Goodworth)

June 26 17 Amended preliminary statement findings of fact, conclusions of law, discussion filed and ORDER entered directing Roma J. Stewart substituted as a defendant in the case in place of Davit Tatel; further ordered that defs' motion for summary judgment denied; further ordered that plfs' motion for summary judgment granted; further ordered that HEW Form 639A as drafted in July 1976 invalide, void & of nc effect; further ordered that defs. and successor administrators of statutes, laws and regulations permanently enjoined from using HEW Form 639A as presently composed and drafted from terminating or refusing to grant or attempting to terminate or refusing to grant plfs. Federal financial assistance under Federal Basic Education Opportunity Grant for non-compliance with Title IX and/or regulations promulgated unless sex discrimination involving either admissions & recruitment has been properly proved at full hearing adequate notice to all persons affected by said proceeding and from terminating at time the Student Loan Program now in effect at Grove City College (Simmons, J.)

Civil Action Docket Sheet

June 26 — Pursuant to amended findings of fact, conclusions of law and order entered, judgment of record hereby entered accordingly

GILBERT W. CONLEY, *CLERK*

Aug. 22 18 Notice of appeal filed by U.S.

Aug. 25 — Copies of notice of appeal to US Ct. of Appeals; appellee; letters to counsel; Judge; Court Reporter

Sept. 3 19 Notice of Cross Appeal filed by the Pltf. Grove City College.

Sept. 9 — Original record mailed to US Ct. of Appeals.

Sept. 19 — Receipt received from the U.S. Court of Appeals for Original Record.

Oct.2 — Notice received from the U.S. Court of Appeals that the above case was docketed at (80-2383 and 80-2384)

COMPLAINT, filed 11-13-78.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

COMPLAINT

Civil Action No. 78-1293

GROVE CITY COLLEGE, Individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH; and VICTOR E. VOUGA,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; DAVID TATEL, Director of the United States Office for Civil Rights,

Defendants.

Plaintiffs, for their complaint, allege upon information and belief that:

JURISDICTION

1. This action arises under Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended 88 Stat. 1862 (1974), 90 Stat. 2234 (1976), 20 U.S.C. §1861 *et seq.*, ("Title IX") as hereinafter more fully appears. The court has jurisdiction for review pursuant to Title IX, 20 U.S.C. §1682; The Administrative Procedure Act, 5 U.S.C. §701 *et seq.;* The Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; 28 U.S.C. §1331; and 28 U.S.C. 1361.

Complaint, filed 11/13/78

PARTIES

2. Grove City College ("The College") is a private coeducational institution of higher education, affiliated with the United Presbyterian Church, located in Grove City, Pennsylvania, and chartered as an educational institution under the laws of the Commonwealth of Pennsylvania.

3. Marianne Sickafuse, a resident of Pennsylvania, is a fulltime student at the College who is a recipient of a Basic Educational Opportunity Grant totaling $400.00 for the academic year 1978-79.

4. Kenneth J. Hockenberry, a resident of New Jersey, is a fulltime student at the College who is a recipient of a Basic Educational Opportunity Grant totaling $600.00, as well as a Guaranteed Student Loan totaling $2000.00, for the academic year 1978-79.

5. Jenifer S. Smith, a resident of Pennsylvania, is a fulltime student at the College who is a recipient of a Guaranteed Student Loan totaling $1000.00 for the academic year 1978-79.

6. Victor E. Vouga, a resident of Wisconsin, is a fulltime student at the College who is a recipient of a Guaranteed Student Loan totaling $2500.00 for the academic year 1978-79.

7. Defendant Joseph A. Califano, Jr. (the "Secretary") is secretary of the Department of Health, Education, and Welfare ("HEW"). HEW is administered under the supervision and direction of Defendant Secretary Califano.

8. Defendant David Tatel, is Director of the Office for Civil Rights ("OCR"), the division of HEW responsible for enforcement of Title IX. The Office for Civil Rights is administered under the supervision and direction of Defendant Director Tatel.

Complaint, filed 11/13/78

FIRST CLAIM FOR RELIEF

9. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* ("Title IX") provides, *inter alia:*

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . (20 USC § 1681(a)).

10. In enforcing the non-discrimination requirements of Title IX, each federal department and agency which is empowered to extend federal financial assistance, other than a contract of insurance or guaranty, is authorized to issue rules, regulations, and orders. 20 U.S.C. § 1982. Pursuant to this authority, the Secretary has issued regulations establishing certain requirements for recipients of federal financial assistance administered under the auspices of HEW. In addition, the Secretary has designated the Director of OCR as his chief enforcement officer under Title IX. 45 C.F.R., Part 86 (1977).

11. The Secretary's regulations have defined federal financial assistance to include funds made available for:

> (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
>
> (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the

> Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
>
> (3) Provision of the services of Federal personnel.
>
> (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
>
> (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

45 CFR 86.2(g) (1) (1977).

12. The Secretary's regulations have defined a recipient of Federal financial assistance as follows:

> (h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates and education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

45 CFR 86.2(h) (1977).

13. The Secretary requires that an Assurance of Compliance (Form 639) with Title IX be executed by all educational institutions which it considers to be recipients of federal financial assistance, or for all institutions which are applicants for federal financial assistance. See 45 CFR 86.4 (1977).

14. This Assurance of Compliance (Exhibit A) is not limited to any specific educational program or activity carried out by the recipient or applicant, but requires a contractual guarantee that the signatory educational institution will comply with *all* regulations issued by HEW pursuant to Title IX without limitation.

15. Currently the aforementioned regulations include, *inter alia,* those concerning employment, housing, athletics, health services, counseling, and employment assistance to students. 45 CFR, subparts D & E (1977).

16. The College receives no Federal or State financial aid and more particularly, receives no financial aid from either the Secretary or the Commonwealth of Pennsylvania, but receives substantially all its income from gifts, endowment and student fees.

17. One Hundred Forty (140) of the College's students, including Kenneth J. Hockenberry and Marianne Sickafuse, are eligible to receive Basic Educational Opportunity Grants ("BEOG's") appropriated by Congress and allocated by the Secretary pursuant to 20 U.S.C. § 1070a.

18. The College's sole function with respect to BEOG's is to certify that students applying for the grants are matriculating at the college.

19. BEOG's are distributed by the Secretary directly to students, including students such as Kenneth J. Hockenberry and Marianne Sickafuse, without participation or knowledge of the College.

20. Three Hundred Forty-two (342) of the College's current students, including Kenneth J. Hockenberry, Jenifer S. Smith and Victor E. Vouga, have obtained loans from private lending institutions or banks which are guaranteed by the Commonwealth of Pennsylvania. The United States, in turn,

guarantees 80% of the Commonwealth's obligation. The interest due upon these loans is paid directly to the private lending institutions or banks, for a limited period of time, by the United States through the Secretary pursuant to provisions of the Guaranteed Student Loan Program ("GSL"), 20 U.S.C. §§ 1071 *et seq.*

21. The College's sole function with respect to the GSL program is to certify a student's enrollment and the College's own current schedule of educational expenses.

22. GSL funds are distributed to students, including students such as Kenneth J. Hockenberry, Jenifer S. Smith and Victor E. Vouga, without participation or knowledge of the College.

23. During July 1976, the Secretary requested the College to execute an Assurance Compliance, as required by 45 CFR § 86.4 (1977), requiring *inter alia,* assurance that the College was operating federally-funded educational programs in compliance with Title IX and all applicable HEW regulations (45 CFR, part 86) implementing Title IX.

24. The College refused to execute HEW's Assurance of Compliance on the grounds that it receives no federal financial assistance.

25. Pursuant to 45 CFR Parts 80, 81 and 86 (1977), the Secretary began proceedings to declare the College and thereby its students, including Marianne Sickafuse, Kenneth J. Hockenberry, Jenifer S. Smith and Victor E. Vouga, ineligible to receive BEOGs, GSLs and any other federal financial assistance administered by the Secretary.

26. Following a hearing before an administrative law judge, by decision and order dated September 18, 1978 ("Order"), the College was found to be a recipient of federal financial assistance. The decision of the Administrative Law Judge further found that "there was not the slightest hint of any

failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX."

27. As a consequence of the order, the College and thereby its students, including Marianne Sickafuse, Kenneth J. Hockenberry, Jenifer S. Smith and Victor E. Vouga, were declared ineligible to participate in either the BEOG or GSL programs.

28. Students attending the College, including Marianne Sickafuse, Kenneth J. Hockenberry, Jenifer S. Smith and Victor E. Vouga, who have already been granted funds under either the BEOG or the GSL programs will, according to the order, receive no further funds under either program.

29. The order is a final order of the Secretary. 45 CFR § 81-104 (1977).

30. Plaintiffs have exhausted their administrative remedies. 45 CFR § 81.106 (1977).

31. Plaintiffs are aggrieved and irreparably harmed by the actions of the Secretary and the order.

32. As applied to the College and its students, 45 CFR 86.2(g) and 86.2(h) (1977) are outside the power of the Secretary to enforce.

33. The order and decision dated September 18, 1978, and the prior orders of the Secretary requiring the College to execute the Assurance of Compliance are null and void.

SECOND CLAIM FOR RELIEF

PLAINTIFFS REPEAT AND REALLEGE PARAGRAPHS 1 THROUGH 31, AND FURTHER ALLEGE:

34. There exists between the parties to this action an actual, justiciable controversy within the purview of the Declaratory

Judgment Act, 28 U.S.C. §2201, and plaintiffs are entitled to a declaration that:

A. The College need not execute the Assurance of Compliance of the Secretary;

B. As applied to the College, 45 CFR 86.2(g) and 86.2(h) (1977) are outside the power of the Secretary to enforce.

THIRD CLAIM FOR RELIEF

PLAINTIFFS REPEAT AND REALLEGE PARAGRAPHS 1 THROUGH 31, AND FURTHER ALLEGE:

35. There exists between the parties to this action an actual, justiciable controversy within the purview of the Declaratory Judgment Act, 28 U.S.C. § 2201, and plaintiffs are entitled to a declaration that:

A. The College need not execute the Assurance of Compliance of the Secretary;

B. As applied to the College, 45 CFR, subparts D & E (1977), are outside the statutory authority of Title IX.

FOURTH CLAIM FOR RELIEF

PLAINTIFFS REPEAT AND REALLEGE PARAGRAPHS 1 THROUGH 31, AND FURTHER ALLEGE:

36. The decision and order of September 18, 1978, were arbitrary, capricious and an abuse of discretion, in that, *inter alia*, the Administrative Law Judge failed to declare invalid the Secretary's application of the regulations, 45 CFR 86.2(g) & (h) (1977), and failed to declare invalid the Secretary's requirement that an Assurance of Compliance be executed.

Complaint, filed 11/13/78

FIFTH CLAIM FOR RELIEF

PLAINTIFFS REPEAT AND REALLEGE PARAGRAPHS 1 THROUGH 31, AND FURTHER ALLEGE:

37. The College's constitutional right to manage and operate its institution as it sees fit, free from unreasonable governmental interference, is violated by the Secretary's requirement that it sign an Assurance of Compliance. Furthermore,the First Amendment rights of the College and its students to associate in an academic community holding deeply felt moral, cultural, and political values are unconstitutionally violated by the Secretary's actions.

38. There exists between the parties to this action an actual, justiciable controversy within the purview of the Declaratory Judgment Act, 28 U.S.C. § 2201, and pliantiffs are entitled to a declaration that:

A. The College need not execute the Assurance of Compliance of the Secretary;

B. The application of Title IX and its implementing regulations violates rights guaranteed to the College and its students under the First and Fifth Amendments to The Constitution of the United States.

WHEREFORE, plaintiffs demand that the Court adjudge, decree and declare alternatively either that:

A. The College need not execute the Assurance of Compliance of defendant;

B. Defendant's regulations requiring compliance with Title IX are promulgated without authority in requiring execution by the College of the Assurance of Compliance;

C. Defendant's regulations requiring compliance with Title IX are unconstitutionally applied to the College.

D. Defendants cannot require the College to comply with regulations which are beyond its statutory authority to promulgate and is enjoined from so doing.

E. Any other relief which may be proper.

Dated: November , 1978

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ANSWER, filed 3-26-79.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No.
78-1293

GROVE CITY COLLEGE, *et al.*,

Plaintiffs,

v.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; DAVID TATEL, Director of the United States Office for Civil Rights,

Defendants.

ANSWER

Defendants Joseph A. Califano, Jr. and David Tatel, by their attorneys, for their Answer to the Complaint herein allege as follows:

FIRST DEFENSE

The Plaintiffs fail to state a claim upon which relief can be granted.

SECOND DEFENSE

In response to the numbered paragraphs of the Complaint, defendants hereby admit, deny and otherwise allege as follows:

1. This paragraph contains plaintiffs' characterization of this action and no allegations of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

2. Admitted.

3. Denied for lack of information or knowledge sufficient to determine the truth of the allegations.

4. Denied for lack of information or knowledge sufficient to determine the truth of the allegations.

5. Denied for lack of information or knowledge sufficient to determine the truth of the allegations.

6. Denied for lack of information or knowledge sufficient to determine the truth of the allegations.

7. The allegations in the first sentence of paragraph 7 are admitted; the allegations in the second sentence of paragraph 7 are denied and the Court is respectfully referred to the relevant sections of the United States Code for a true characterization of the duties of Defendant Secretary Califano.

8. The allegations in the first sentence of paragraph 8 are admitted; the allegations in the second sentence of paragraph 8 are denied and the Court is respectfully referred to the relevant sections of the United States Code for a true characterization of the duties of Defendant Director Tatel.

9. Admitted.

10. Admitted that each Federal department and agency which is empowered to extend Federal financial assistance, other than a contract of insurance or guaranty, is authorized and directed to issue rules, regulations, and orders, to effectuate the provisions of 20 U.S.C. Section 1681, 20 U.S.C. Section 1682; that pursuant to the above authority the Secretary has promulgated regulations, duly reviewed by Congress and signed by the President, which establish certain requirements for recipients of Federal financial assistance administered by and through the Department; and that the Secretary has designated the Director of OCR as his chief

enforcement officer under Title IX. 45 C.F.R., Part 86 (1977). All other allegations contained in paragraph 10 are denied.

11. Admitted.

12. Admitted.

13. Denied, and the Court is respectfully referred to 45 C.F.R. Section 86.4.

14. Denied, and the Court is respectfully referred to the Assurance of Compliance for the true meaning thereof.

15. Denied, and the Court is respectfully referred to 45 C.F.R. Subparts D and E (1977) for the true meaning thereof.

16. Denied insofar as the allegations in paragraph 16 relate to Federal financial assistance and otherwise denied for lack of information or knowledge sufficient to determine the truth of the allegations.

17. Admitted that a number of the Plaintiff College's students are eligible to, and do, receive Basic Educational Opportunity Grants ("BEOG"), but the allegations as to the exact number of students at the College who may be eligible for such grants are denied for lack of information or knowledge sufficient to determine the truth of the allegations.

18. Denied.

19. Denied.

20. Admitted that some of the Plaintiff College's students receive loans provided through the Guaranteed Student Loan ("GSL") Program which is administered by the defendant Secretary the allegations as to the number of students at the Plaintiff College receiving loans are denied for lack of information or knowledge sufficient to determine the truth of the allegations; and the remaining allegations in paragraph 20 are denied.

21. Denied.

22. Denied.

23. Admitted and the Court is respectfully referred to the Assurance of Compliance for the contents thereof.

24. Admitted.

25. The allegations in paragraph 25 are admitted insofar as they allege that proceedings were commenced pursuant to 45 C.F.R. Parts 80, 81 and 86 to declare the Plaintiff College ineligible to receive Federal financial assistance administered by the Defendant Secretary, and all other allegations in paragraph 25 are denied, including the allegation that proceedings were initiated to declare students at the Plaintiff College ineligible to receive Federal financial assistance administered by the Defendant Secretary.

26. Denied and the Court is respectfully referred to the decision and order of the administrative law judge for the true contents thereof. The allegations in the second sentence of paragraph 26 are further specifically denied insofar as they imply that the administrative law judge made a factual finding that the Plaintiff College does not discriminate in violation of Title IX.

27. The allegations in paragraph 27 are admitted insofar as they allege that the Plaintiff College was declared ineligible to participate in either the BEOG or GSL programs, denied insofar as they allege that the students at the Plaintiff College were declared ineligible to participate in those programs, and the Court is respectfully referred to the decision and order of the administrative law judge for the true contents thereof.

28. The allegations in paragraph 28 are denied insofar as they allege that the decision of the administrative law judge affects student eligibility under the BEOG or GSL programs

and otherwise are denied for lack of information or knowledge sufficient to determine the truth of the allegations.

29. Admitted.

30. Admitted.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

WHEREFORE, defendants, having fully answered, respectfully pray for judgment denying each and every prayer for relief, dismissing the action, granting defendants their costs and granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer upon plaintiffs by mailing a copy thereof in a postage prepaid envelope on this 22nd day of March, 1979, to:

Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, New York 14603

MARK C. RUTZICK

AFFIDAVIT OF CHARLES S. MacKENZIE IN SUPPORT OF MOTION.

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Civil Action No. 78-1293

GROVE CITY COLLEGE, Individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH; and VICTOR E. VOUGA,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; DAVID TATEL, Director of the United States Office for Civil Rights,

Defendants.

CHARLES S. MACKENZIE, being duly sworn, says:

1. I am President of Grove City College ("the College"), a plaintiff in the above-captioned action, and make this affidavit in support of plaintiff's motion.

2. The College is a 4-year, private coeducational institution, affiliated with the United Presbyterian Church, and chartered as an educational institution under the laws of the Commonwealth of Pennsylvania.

3. The College has consistently maintained a policy that as a private education institution guided by deeply held moral, religious, and political beliefs, it should maintain both a Christian world-view and a freedom philosophy. Toward that end it has dedicated itself to maintaining its independence by

erecting a wall of separation between itself and government. In accordance with that policy, the College has promulgated the following statement:

> For over 100 years Grove City College has affirmed both a Christian world view and a freedom philosophy. Those guiding Grove City believe that freedom and Christian faith are interrelated and interpendent.
>
> Grove City College exhibits its own independence and freedom by rejecting funding from any government agency. Though charges to its 2200 students are among the lowest of any quality college in America, for many years the College has operated "in the black" and has no indebtedness. Efficiency and productivity are carefully balanced with a high academic program. Grove City's total charges are about $2,000 lower than average charges of other private four-year colleges. This is accomplished without government funding which is avoided to preserve the College's independence and freedom.

4. The College has consistently maintained this policy of refusing to accept any state or federal aid. Accordingly, all of its buildings and other capital improvements are funded from private monies. In addition, the College receives substantially all of its operating income from gifts, endowment, and student fees. It receives no state or federal funding.

5. Because the cost of education has risen greatly in the past decades, however, the College has maintained a policy that upon the request of a student and at the student's sole discretion, it will provide information and/or certify a student's enrollment to any organization, private or governmental, which requires information about students who request the financial assistance necessary to complete their educations.

6. As more fully set out in the affidavit of L.L. Crill, the College's Financial Aid Officer, the participation of the

College in the Basic Educational Opportunity Grants ("BEOG") and Guaranteed Student Loan ("GSL") Programs is confined solely to those ministerial acts. It receives no direct funding from HEW through the BEOG or GSL programs, nor does it determine student eligibility, financial need, or otherwise participate in these programs. Instead the students receive direct payments, either from HEW or private lenders, which are applied, at their discretion, to their educational expenses.

7. On July 15, 1975, I signed an "Agreement Regarding Institutional Participation in the Guaranteed Student Loan Program." (See Exhibit P-9, p. 3 to HEW Administrative Hearing, attached.) The Agreement was limited in scope, and concerned only the College's pledge that, consistent with the regulations in 45 CFR Subpart 177f, it would maintain records and establish policies consistent with maintaining the integrity of federally guaranteed student loans. As I noted in my letter accompanying the agreement (Exhibit P-9, p. 6 to HEW Administrative Hearing, attached), I regarded the agreement as limited to providing that moneys provided to students by the federal government were properly safeguarded should students terminate their enrollment at the College. It was my understanding that 45 CFR Subpart 177f is similarly so limited.

8. On or about April 4, 1977, I received a request from Albert T. Hamlin, Acting Director, Office of Civil Rights, to sign an Assurance of Compliance under Title IX of the Education Amendments of 1972 (Exhibit X-5 to Administrative Hearing). Because the College receives no federal financial assistance, with the approval of the College Board of Trustees I refused to sign the Assurance, which was purportedly required by 45 CFR §86.4 (1977). Another request was received from David Tatel, Director of the Office for Civil Rights, on or about August 1, 1977 (Exhibit X-6 to Administrative Hearing).

9. Mr. Tatel notified me on or about December 8, 1977, that due to the failure of the College to sign an Assurance of Compliance, he had referred the matter to the Office of the General Counsel of HEW with a recommendation that enforcement proceedings be commenced (Exhibit X-7 to Administrative Hearing). Those proceedings were commenced on or about December 2, 1977 when a Notice of Hearing was served upon me (Exhibit X-4 to Administrative Hearing).

10. A hearing was held before Administrative Law Judge Albert P. Feldman at Philadelphia, Pennsylvania, on March 10, 1978. In a Decision and Order dated September 16, 1978, Judge Feldman found that the College, due to the receipt by its students of BEOG and GSL funds, was a recipient of Federal financial assistance. Because the College refused to sign the Assurance of Compliance, Judge Feldman ordered that all financial assistance administered by HEW was to be terminated and no longer granted to students of the College, including specifically the BEOG and GSL programs.

11. It was solely because of the College' refusal to sign the Assurance of Compliance that HEW instituted compliance proceedings, and it was solely for this reason that Administrative Law Judge Albert P. Feldman ordered that all financial assistance administered by HEW was to be terminated and refused to be granted to the College. See Notice of Hearing and Decision and Order of September 16, 1978.

12. As Judge Feldman noted in his decision at p. 12, however, ". . . there was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX." Grove City College does not discriminate, and, moreover, it asserts no right to discriminate. As its catalog states on the title page:

Affidavit of Charles S. MacKenzie, dated 7/23/79
"NOTICE OF NON-DISCRIMINATION POLICY"

> Grove City College, a private educational institution, admits students of any race, color, sex, religion, and national or ethnic origin to all of the rights, privileges, programs, and activities generally accorded or made available to students at the College. Grove City College does not discriminate on the basis of race, color, sex, religion, and national or ethnic origin in the administration of its educational programs, admission policies, scholarship and loan progams, athletics, co-curricular activities or other College-administered programs."

13. Instead, as Administrative Law Judge Feldman noted, the refusal of the College to sign the Assurance of Compliance "is obviously a matter of conscience and belief." See Decision at p. 12. Because the College has scrupulously avoided the receipt of any federal or state aid, it refuses to sign a potentially unlimited contractual obligation to comply with all regulations issued by HEW, present and future, regarding all aspects of the College's operations, including employment, housing, athletics, health services, counseling, and assistance to students.

14. It is for this reason that the college seeks a determination by this court that: (1) The College need not execute the Assurance of Compliance sought by Defendants; (2) A declaration that Defendant's regulations requiring compliance with Title IX are not applicable to the College; and (3) That Defendant's regulations requiring compliance with Title IX are unconstitutionally applied to the College.

/s/ CHARLES S. MACKENZIE

Subscribed and sworn to before
me on July 23, 1979.

/s/ Carl M. Sautter
Notary Public
CARL M. SAUTTER, Notary Public
Grove City, Mercer Co. Pa.
My Commission Expires Sept. 5, 1981

[Exhibits omitted]

AFFIDAVIT OF LELAND L. CRILL IN SUPPORT OF MOTION.

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

GROVE CITY COLLEGE, Individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH; and VICTOR E. VOUGA,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; DAVID TATEL, Director of the United States Office for Civil Rights,

Defendants.

LELAND L. CRILL, being duly sworn, deposes and says:

1. I am Financial Aid Officer for Grove City College ("the College"), a Plaintiff in the above-captioned action, and have held this position for the past fourteen years. I make this affidavit in support of plaintiff's motion.

2. The policy of the College's Financial Aid Office, as set by the President and the Board of Trustees, is not to participate in any federal or state student financial aid programs which provides governmental funds to the College, or which would require any determination by the College of a student's eligibility to receive financial aid.

Accordingly, the College has never participated in the so-called "campus-based programs" administered by the defen-

dant Department of Health, Education and Welfare ("HEW"). Specifically, the College has never participated in the Supplemental Educational Opportunity Grants Program ("SEOG"), authorized by 20 USC §1070b, which requires that: 1) an institution of higher education request Federal allocations from the SEOG program; 2) receive Federal funds administered through HEW; and 3) distribute those funds to students it deems eligible, under relevant HEW criteria. See 45 CFR Part 176 (1978). Nor has the College applied for or received funds under the College Work Study Program authorized by 42 USC §2751 *et seq.*, which requires a similar receipt of Federal funds administered by HEW and the establishment of part-time job opportunities for students deemed eligible by an educational institution, which employment is paid in part by the Federal Funds and in part by the institution. See 45 CFR Part 175. Finally, the College has never participated in the National Direct Student Loan Program, authorized by 20 §USC 1087aa *et seq.*, by which Federal funds are paid directly to institutions of higher education, which in turn determine student eligibility and administer the loan program. See 45 CFR Part 144 (1978).

3. The sole role of the Financial Aid Office with regard to student aid programs is to provide the same information it supplies for any organization, whether private or governmental, which supplies financial assistance to our students. More specifically, the Financial Aid Office will certify a student's attendance of the college, indicate whether the student is full-time or part-time, and provide general information as to the College's academic program and the cost of tuition, room, and board to its students. Upon request, the Financial Aid Office will also certify whether a student continues to attend the College. (See Ex. P-9, p. 3 to Administrative Hearing, attached to MacKenzie Affidavit.) The Financial Aid Office also maintains records to protect against repayment defaults and has instituted a fair and reasonable refund policy.

Affidavit of Leland L. Crill, dated 7/23/79

4. With regard to the Basic Educational Opportunity Program ("BEOG"), the College has advised HEW that it does not wish to calculate BEOG awards, to receive Federal funds, or to make disbursements to students. In response to the College's notification, HEW has requested the College to provide forms to students desiring BEOG awards in lieu of its participation. (See January 14, 1974 letter of Peter K.V. Voight, attached as Exhibit A.)

5. Thus, the only participation the College has in the BEOG program is to fill out the information requested in Part B of the "Request for Payment of BEOG Award" (DE Form 304, a blank copy of which is attached as Exhibit B). In addition, the Financial Aid Office certifies that the student is enrolled at the College. Most of the information provided by the College, which includes the length of the academic year and the cost of tuition, room and board, is published in its catalog. The only other information provided is the student's attendance status and the student's expected beginning and ending dates of attendance. After the form is completed, it is returned to the student. Upon information and belief, the student submits the form to the Basic Grants Program, which then makes an award. At no time after the College's completion of the form does it have any participation in the BEOG program, as the award is paid directly to the student.

6. The College's participation in the Guaranteed Student Loan Program ("GSL") is similarly limited. Students desiring these loans obtain approval from a private lending institution. A form is then sent to the College, which provides essentially the same information as it provides for the BEOG program. (See form attached as Exhibit C.) The College then returns the form to the student or his bank, which then processes the application through the state GSL program, and makes the loan out of its own funds. Although some student's checks are payable jointly to the student and the College, the proceeds are applied directly to the student's account. The College does not request

this procedure, but instead regards it a means chosen by the lending institution to ensure that loan proceeds are applied to the student's educational expenses.

7. The Financial Aid Office cooperates in no other HEW-administered student aid programs other than the two outlined above.

/s/ LELAND L. CRILL

Subscribed and sworn to
before me on July 23, 1979.

/s/ CARL M. SAUTTER
Notary Public
CARL M. SAUTTER, Notary Public
Grove City, Mercer Co., Pa.
My Commission Expires Sept. 5, 1981

Exhibit A — Letter, dated 1-14-74 attached to Crili Affidavit.

Dr. MacKenzie
President
Grove City College
Grove City, Pennsylvania 16127

January 14, 1974

Dear President:

We have been advised by the Basic Grants Coordinator for your Region that your institution does not wish to participate in the Basic Educational Opportunity Grant (BEOG) Program at this time.

As you know, eligible students may receive Basic Grant awards for attending eligible institutions regardless of whether such institutions have filed with the U.S. Commissioner of Education an agreement to calculate BEOG awards and to make disbursements to students. In view of your institution's decision not to participate in the BEOG Program at this time, we are providing to your institution (under separate cover) a supply of a form letter (addressed to "Dear BEOG Applicant") with copies of OE Form 304 which may be used by eligible students in applying for payment of their BEOG awards directly from the U.S. Commissioner of Education. Additional supplies of the form letter and OE Form 304 may be requested as needed from BEOG, Box O, Iowa City, Iowa 52240.

To be eligible for a BEOG award, a student must be a first-time, full-time student during the academic year 1973-74; please supply one set of the form letter (with OE Form 304) to each potentially eligible student so that he or she may apply directly for a BEOG award. Your assistance in providing forms to eligible students so that they may apply for their BEOG awards will be greatly appreciated.

Letter, dated 1/14/74

We hope that your institution may decide at a future date to participate in the BEOG Program since your participation would provide for a faster and more personalized financial aid service to the students who attend your institution. If you decide to participate, please let us know so that we may provide copies of our Institutional Agreement form to you.

Thank you for your interest in the Basic Educational Opportunity Grant Program.

Sincerely,

/s/ PETER K.U. VOIGT
Acting Coordinator
Basic Educational Opportunity
Grant Program

CC: Mr. Leland Crill
Financial Aid Officer

Enclosing: Application for Determination of
Family Contribution
Dear BEOG Applicant letter
with OE Form 304

Exhibit B — Instructions for Completing OE Form 304 attached to Crill Affidavit

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
BUREAU OF STUDENT FINANCIAL ASSISTANCE
WASHINGTON, D.C. 20202

(SEAL)

Dear BEOG Applicant:

If the educational institution in which you will be enrolled for the 1979-80 award period is participating in the Basic Educational Opportunity Grant (BEOG) Program under the Alternate Disbursement System, you must complete one copy of the OE Form 304 in order to request payment of your Basic Grant award.

You should complete Part A of the OE Form 304 and have it notarized. Then, as soon as possible after you begin attending classes, you should submit the form to the Financial Aid Officer at the institution for completion of Part B. The Financial Aid Officer will return the form to you. You should then mail the form, together with one copy of your Student Eligibility Report (SER), to: Basic Grant Program, P.O. Box K, Iowa City, Iowa 52243. Keep the other parts of this packet for your records. You should retain a reproduced copy of your OE Form 304.

Deadlines for submitting the SER and OE Form 304. The Basic Grant regulations stipulate that, in order to receive payment, a student must submit to the school a valid Student Eligibility Report (SER) while still enrolled, and before the end of the school's academic year or before May 31, 1980 (whichever is earlier). As an exception to this, if a student's program of study begins on or after May 1, 1980, the student has until June 30, 1980 to submit a valid SER to the institution. The above deadlines apply to initial as well as subsequent payments unless unusual circumstances have occurred or corrections are

necessary. For students who enroll on or after May 1, 1980, the deadline for requesting subsequent payments is July 30, 1980. **Note:** The valid SER, together with the OE Form 304 or request(s) for additional payments, submitted to Box K in Iowa City, must be received no later than 10 days after the applicable deadlines, as specified.

Notification, Initial payment, and additional payments. After receipt and processing of your Request for Payment (OE Form 304), you will receive an ADS Student Report (OE Form 304-1) advising you of your Scheduled Basic Grant, your expected disbursement, the amount of your first payment, and the procedure to follow in applying for subsequent payment(s). A check for the amount of your first payment will be sent to you under **separate** cover from the U.S. Treasury Department. *Additional payments are not sent to you automatically. You must submit your ADS Student Report (OE Form 304-1) at the beginning of each subsequent term (semester, trimester, or quarter) or payment period.* **Note:** If you are a clock hour student, the amount of your award depends on the number of hours your institution expects you to complete during the 1979-80 award period. The first payment will be for one-half of the number of hours you are expected to complete during the 1979-80 award period. You may request the second payment only after you have completed the number of clock hours required for the first payment. Your second payment will then be adjusted to reflect the number of clock hours you will be expected to complete prior to the end of the award period. If you have not received your ADS Student Report after six weeks, write to BEOG, P.O. Box K, Iowa City, Iowa 52243, or call the toll-free number 800/553-6350. Be sure to include your name, permanent mailing address, telephone number, Social Security number, and date of birth.

Amount of award. The amount of your Scheduled Basic Grant will be computed primarily on the basis of two factors: your eligibility index (from Section 4 of your Student Eligibility

Report) and your total student cost (as supplied by the institution in Part B of the OE Form 304). The BEOG awards for full-time study for the 1979-80 award period are indicated on the 1979-80 Payment Schedule. Eligible institutions have been provided with a copy of this Schedule. The amount of the award to be paid may be less than the Scheduled Basic Grant if you (1) are enrolled on a less than full-time basis, or (2) are enrolled for less than a full academic year (clock hour programs less than 900 hours) between the dates of July 1, 1979 and June 30, 1980. An expected disbursement will be computed for you, it will reflect any reductions of the award because of these factors.

Finding of ineligibility. If the institution finds that you are ineligible for a BEOG award, your Request for Payment form may be returned to you unsigned by the institution (e.g., enrollment in an ineligible program of study, inconsistent data reported to the school on previous forms, etc.). If you have any questions about the institution's determination of ineligibility, you may address the questions to: BEOG Program, ADS Section, R.O.B. 3, 400 Maryland Avenue S.W., Washington, D.C. 20202. You may also address any other problems you are experiencing with corrections or payments to this address.

Responsibility for repayment (because of termination or overpayment). If you should terminate your enrollment for any reason before the end of an academic term or period for which you have received or applied for a payment of a BEOG award, you are required to notify the BEOG Program of the date of termination. This notification should be addressed to: BEOG Program, ADS Section, R.O.B. 3, 400 Maryland Avenue S.W., Washington, D.C. 20202. If it has been determined that you are in an overpayment status, the overpayment should be sent to the same address.

Instructions for Completing OE Form 304

BEOG awards for next year. Basic Grant awards will be computed and disbursed for the current 1979-80 award period (i.e., the period from July 1, 1979 through June 30, 1980) on the basis of your present 1979-80 Student Eligibility Report. If your period of study extends into the 1980-81 award period (i.e., the period from July 1, 1980 through June 30, 1981), you may be eligible for a Basic Grant award for that year. However, to receive payment for any study performed beyond June 30, 1980, you will be required to reestablish your financial need by submitting a new application form for the 1980-81 award period. The application form for that year will be available from participating institutions in early 1980. **Note:** If you are a clock hour student, you may receive payment in the 1980-81 award period only after you have completed the clock hours for which you were paid in 1979-80.

Sincerely,

/s/DAVID V. KERR
Director
Division of Program Operations

ADS-(304)

Exhibit B — Instructions for Completing OE Form 304 attached to Crill Affidavit.

Steps in Completing OE Form 304

Note: Be sure to follow these steps in completing and submitting your Request for Payment (OE Form 304).

1 Complete Part A of the OE Form 304 in accordance with the attached instructions for Part A, and have the form notarized. Keep all other parts of this packet, and reproduced copies of your OE Form 304 and SER, for your records: they contain information for future reference.

2 Submit the OE Form 304 and instructions to the Student Financial Aid Officer at the institution, who will complete Part B of the form in accordance with the instructions for that part and return the form to you.

3 Detach the OE Form 304 from the instructions and submit the *form only*, together with one copy of your Student Eligibility Report (SER), to the processor.

Basic Grants Program
P.O. Box K
Iowa City, Iowa 52243

4 Any initial payment request (OE Form 304 together with the valid SER) and any additional payment request (OE Form 304-1) must be received by the processor no later than 10 days after the applicable deadline specified on the previous page.

Notice to Applicants

Information Collected on OE Form 304:

Subsection (e)(3) of the Privacy Act of 1974 [5 U.S.C. 552a(e)(3)] requires that an agency inform each individual whom it asks to supply information of (1) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information

and whether disclosure of such information is mandatory or voluntary, (2) the principal purpose or purposes for which the information is intended to be used, (3) the routine uses which may be made of the information as published in the Federal Register and (4) the effects, if any, of not providing all or any part of the requested information.

1 The authority for collecting the requested information is section 411(b)(2) of Title IV-A-1 of the Higher Education Act of 1965, as amended [20 U.S.C. 1070a(b)(12)]. Applicants are advised that the disclosure of the requested information is mandatory.

2 This information is being collected in order to calculate the amount of your Basic Educational Opportunity Grant award under the Alternate Disbursement System.

3 On request information may be provided to members of Congress who inquire on behalf of a student who is a constituent, or where appropriate, on behalf of the parents of the student. In addition the routine uses listed in Appendix B of 45 C.F.R. 5B may be utilized.

4 Applicants and institutions must provide all of the requested information in order to have their requests for payment processed.

Use of Social Security Number:

Section 7(b) of the Privacy Act of 1974 (5 U.S.C. 522a) requires that when any Federal, State or local government agency requests an individual to disclose his Social Security account number, that individual must also be advised whether that disclosure is mandatory or voluntary, by what statutory or other authority the number is solicited, and what uses will be made of it.

Accordingly, applicants are advised that disclosure of their Social Security account number (SSAN) is required as a condition for participation in the Basic Educational Opportunity Grant Program (BEOG), in view of the practical administrative difficulties which the program would encounter in maintaining adequate program records without the continued use of the SSAN.

The SSAN will be used to verify the identity of the applicant, and as an account number (identifier) throughout the life of the grant in order to record necessary data accurately. As an identifier, the SSAN is used in such Program activities as determining Program eligibility, certifying school attendance and student status, making grant payments under the Alternate Disbursement System and verifying grant payments.

Authority for requiring the disclosure of an applicant's SSAN is grounded on section 7(a)(2) of the Privacy Act, which provides that an agency may continue to require disclosure of an individual's SSAN as a condition for the granting of a right benefit or privilege provided by law where the agency required this disclosure under statute or regulations prior to January 1, 1975, in order to verify the identity of an individual.

The Office of Education has for several years consistently required the disclosure of SSAN numbers on application forms and other necessary BEOG documents. See section 411 (b)(2) of Title IV-A-1 of the Higher Education Act of 1965, as amended [20 U.S.C. 1070a(b)(2)].

Definitions

The new Basic Grant regulations provide for the standardization of terminology for all of the federally funded Student Financial Aid programs. The definitions of the new terms used throughout this form are as follows:

Instructions for completing OE Form 304

1 **Academic year** (formerly school year) A period of time in which a full-time student is expected to complete the equivalent of 2 semesters, 2 trimesters, or 3 quarters at institutions using credit hours or at least 900 clock hours of training for each program at institutions using clock hours (See *ADS Handbook* for further details.)

2 **Award period** (formerly academic year) The period of time between July 1 of one year and June 30 of the following year.

3 **Clock hour:** The equivalent of a 50- to 60-minute class lecture or recitation or a 50- to 60-minute faculty-supervised laboratory, shop training or internship. Students whose program of study does not have a minimum of 600 clock hours are not eligible.

4 **Payment period:** For institutions which use academic terms and measure progress in credit hours a payment period is a span of time which corresponds with each semester, trimester, quarter, or other academic term. Institutions which do not use semesters, trimesters, quarters or other academic terms or which do not measure progress in credit hours must have at least two payment periods between July 1 of one year and June 30 of the following year (an award period). The first payment period is the first half of the hours the student is scheduled to complete within the award period. The second payment period begins when the first payment period ends, and ends when the student completes all hours he or she was scheduled to complete by June 30. Therefore, if the student does not progress as scheduled, the second payment period may extend beyond June 30 into the new award period.

Instructions for completing OE Form 304

Note: No grant award will be made unless a completed application form has been received (20 U.S.C. 1070a, 45 C.F.R. 190.86). **Warning:** Any person who knowingly makes a false statement or misrepresentation in this form shall be subject to a fine or to imprisonment, or to both, under provisions of the U.S. Criminal Code.

Part A — To Be Completed by the Student Applicant

Important: Read this part carefully before filling out Part A of the OE Form 304. Processing cannot begin until you have submitted a completed OE Form 304 and one copy of your 1979-80 Student Eligibility Report (SER). No xeroxed or otherwise reproduced copies of these forms will be processed. Failure to type or print legibly will result in a delay in the processing of your award.

1. **Social Security Number:** Enter your Social Security number. Check to make sure that the number on your SER is the same number you enter on OE Form 304. If the number on your SER is incorrect, cross out the number on your SER and write the correct number above it. We will then correct your record. (You must sign the certification statement on your SER if any change is made. Failure to do so will delay processing of this request for payment.)

2. **Name:** Enter your last name in the first set of boxes, then your first name in the second set. Enter "Jr.", "III," etc., if applicable, as part of your last name. Check to make sure that the name on your SER is the same name you enter on the OE Form 304. If your name is incorrect on your SER (the spelling is wrong or you have recently changed your marital status), cross out the name on the SER, write the correct name above it, and submit a note explaining the change. We will then

correct your record. Note that we will not process any Requests for Payment if the names on the SER and OE Form 304 are different, unless you have indicated that the name on the SER should be changed. (You must sign the certification statement on your SER if any change is made. Failure to do so will delay processing of this request for payment.)

3. **Present Mailing Address:** Enter the address to which any payments due you and/or correspondence should be sent. Make sure you give a postal address, using the state abbreviations listed below. This is the address to which checks will be sent. An institutional address may be used ONLY if you reside at the institution. If you change your address after submitting the OE Form 304, notify your local post office so that any payments or correspondence may be forwarded. In addition, you must notify BEOG, P.O. Box K, Iowa City, Iowa 52243 of your new address in writing immediately.

4. **Permanent Mailing Address:** If the address in 3 above is not your permanent mailing address, enter your permanent mailing address here.

5. **Applicant's Signature:** After you have carefully read the Request for Payment and Student Affidavit sections of Part A, sign and date the OE Form 304 in the presence of a Notary Public.

6. **Notary Public:** You must sign the affidavit in the presence of a notary or other person who is legally authorized to administer oaths or affirmations and who does not take part in the recruiting of students for enrollment at the institution named in Part B of the OE Form 304. When the Notary Public has witnessed your signing of the Student Affidavit, (s)he will supply the required information, sign in item 6, and as applicable, affix the seal or stamp. We cannot make payments until the student affidavit is signed and properly notarized.

State Abbreviation Codes

Alabama	AL	New Jersey	NJ
Alaska	AK	New Mexico	NM
Amer. Samoa	AS	New York	NY
Arizona	AZ	North Carolina	NC
Arkansas	AR	North Dakota	ND
California	CA	Ohio	OH
Canal Zone	CZ	Oklahoma	OK
Colorado	CO	Oregon	OR
Connecticut	CT	Pennsylvania	PA
Delaware	DE	Puerto Rico	PR
District of		Rhode Island	RI
Columbia	DC	South Carolina	SC
Florida	FL	South Dakota	SD
Georgia	GA	Tennessee	TN
Guam	GU	Texas	TX
Hawaii	HI	Trust Territories	TT
Idaho	ID	(Marshall Islands,	
Illinois	IL	Mariana Islands	
Indiana	IN	& Caroline Islands)	
Iowa	IA	Utah	UT
Kansas	KS	Vermont	VT
Kentucky	KY	Virgin Islands	VI
Louisiana	LA	Virginia	VA
Maine	ME	Washington	WA
Maryland	MD	West Virginia	WV
Massachusetts	MA	Wisconsin	WI
Michigan	MI	Wyoming	WY
Minnesota	MN		
Mississippi	MS		
Missouri	MO		
Montana	MT		
Nebraska	NE		
Nevada	NV		
New Hampshire	NH		

If your place of residence is not included above, leave the state code blank and write the name of the country or territory in the space for city

Instructions for completing OE Form 304

Part B—To Be Completed by the Institutional Official

Do not complete this form until after the student has actually begun attending classes.

Note: When you receive the Request for Payment of BEOG Award from the student, review Part A for completeness and confirm that the form has been properly notarized. To avoid delays in processing, read instructions as you complete this form and be sure to complete every item. If your institution has certain programs that are not eligible, make sure the applicant has chosen an eligible program before completing Part B. **The student will be instructed to return the form to you if information is not complete.**

7. **Name and Address of Institution:** Enter the name and address of the institution. If you have separate programs under separate BEOG ID numbers, give the full name of the program in which this student is enrolled. This applies to all hospital-related schools which have several programs. If the student is attending the medical technology program, be sure to include School of Medical Technology as part of the name.

8. **BEOG ID No.:** Every eligible institution, whether participating in the BEOG program directly or through the ADS system, has been assigned a 6-digit numeric code for identification purposes by the U.S. Office of Education. Enter your BEOG ID number. If you do not know your BEOG ID number, contact the BEOG Program, ADS Section, R.O.B. 3, 400 Maryland Avenue S.W., Washington, D.C. 20202.

9. **Institution's Academic Calendar:** The 4 systems indicated in this item of the form are the only systems by which payment requests will be processed. "System" as used on this form means the method by which a student's progress is measured and by which the academic year is broken down. You must check only

ONE system. If your institution does not seem to fit any of these systems, decide which system is the closest to your actual situation. "System" as used on this form does NOT mean billing method. Awards are made on the basis of the type of academic structure, not according to billing dates. A general description of each type of system is provided below to help you determine which system best describes your academic calendar.

Clock hour system is that of an institution where the student's progress is measured in number of daily or weekly clock hours completed, or where the student's progress is measured in credit hours but the school year is not divided into regular quarter semester, trimester, or other academic terms; or where the program of study is continuous rather than broken into standard quarter, semester, or trimester terms. A clock hour is the equivalent of a 50- to 60-minute class, lecture, or recitation; or a 50- to 60-minute faculty-supervised laboratory, shop training, or internship. An eligible program at a proprietary institution must consist of at least 600 clock hours of training. An eligible program at a nonproprietary institution must consist of at least 900 clock hours of training. An academic year must be at least 900 clock hours.

Quarter system is that of an institution whose yearly system is divided into standard academic terms that are roughly 3 months in length, with a scheduled beginning and ending date for each term, and where a student's status is measured each term in quarter hour credits. Three quarters are defined as an academic year.

Semester or trimester system is that of an institution whose yearly system is divided into standard academic terms that are roughly 4 to 5 months in length with a scheduled beginning and ending date for each term, and where a student's progress is measured each term in semester hour credits. Two semesters or trimesters are defined as an academic year. A trimester system differs from a semester system only in that trimesters offer a third term of 4 to 5 months, but, as in a semester system,

a student need attend only 2 trimesters on a full-time basis to have completed 1 academic year.

10. **Transfer Dates:** If the student attended an institution other than the institution identified in item 7 on or after July 1, 1979, indicate the name of the other institution and the dates of attendance since July 1, 1979.

10A. Clock hour. If you checked "C" in item 9, indicate the total number of hours in the student's ENTIRE program, even though the program may (but does not have to) extend beyond the current award period; the number of hours to be completed per week; the number of weeks to be completed in the award period (cannot exceed 52 weeks and should not include vacation time), and the length in clock hours of the academic year for the student's program. (An academic year must be at least 900 clock hours for the student to receive a full award.) Then enter the student's beginning and anticipated ending date for the ENTIRE program. (Example: If a student is enrolled in an 18-month course which began on 04/02/78 and will end on 10/01/79, enter 04/02/78 as the beginning date and 10/01/79 as the ending date.) Enter the date the student actually began attending classes as the beginning date and the calculated completion date as the ending date. The student will be paid the first half of his or her BEOG award only for the first half of the hours to be completed during the award period with this payment request.

Based on the above information, the ending date for the first payment period will be the date on which one-half of the total number of hours in the award period is completed. The student must then submit a Request for Additional Payment (ADS Student Report OE Form 304-1) to receive the second half of his or her award. No second payment will be awarded if the student does not COMPLETE the total number of clock hours in the first payment period. The second period begins when the total number of hours in the first payment period has been completed.

If this is a retroactive payment, please be sure to indicate the actual date the student began classes and the number of hours which he or she has already completed within the current award period (07/01/79-06/30/80). Be sure to include in that item (10A(2)) the number of hours he or she is expected to complete. **Note:** A student cannot receive the second payment until he or she has completed the total number of hours in the first payment period. If the student receives a second disbursement but has fallen behind in completing his or her hours before the end of the award period, no further recalculation is necessary. However, the student would receive no disbursement for the 1980-81 payment period until he or she completes the total number of hours for which he or she has been paid.

10B. Term based. If you checked "Q," "S," or "T" (quarter, semester, or trimester system) in item 9 enter the beginning and ending dates for the FIRST TERM (whether quarter, semester, or trimester) which the student attended or is attending, all or part of which falls within the current award period, even if it is not the term the student is currently attending. (The current award period extends from 07/01/79 to 06/30/80.) If the student is requesting payment for the current term, list the beginning and ending dates of this term. We will calculate an award and make first payment for the student based on the system and dates you enter. If the student does not complete the academic year in accordance with the anticipated attendance we will adjust the award according to the information provided when the student requests payment for subsequent term(s).

A student can be paid in advance for only one term at a time. (S)he is eligible for payment for any term (s)he has already completed if (s)he is still attending the same school. In order to receive retroactive payment the student must submit an OE Form 304 for the first term s(he) completed, all or part of which must fall within the current award period (i.e., between 07/01/79 and 06/30/80). When OE Form 304 processing is completed, (s)he will receive an ADS Student Report. Payment will

be received directly from the U.S. Treasury Department. The student must then submit the ADS Student Report to the processor to request payment for the next term (s)he has completed or is attending. Payment for subsequent terms is NOT AUTOMATIC.

Status: For a student requesting payment for the term (s)he is currently attending, determine the student's status as of the day (s)he submits the OE Form 304 to you. For a student who is requesting payment for a term (s)he has already completed, determine status according to the number of hours the student carried during the term and from which (s)he did not withdraw, NOT according to the number of hours for which credit was actually earned (Example: A student carried 12 credit hours during the first semester but failed one course and so earned only 8 hours. This student would still be considered full-time since (s)he actually attended classes all term on a full-time basis.) Check the appropriate box in item 10B(2) to indicate the student's attendance status. Regulations governing definitions of full-time and part-time students are given below.

Definition of full-time status. Students must meet certain work-load and tuition and fees criteria in order to be considered full time. The institution's definition of full-time should be used if it exceeds the following minimum requirements.

A. *Clock hours.* For institutions on a clock-hour system, a student must be enrolled for a minimum of 24 clock hours per week to be considered full-time.

B. *Term based.* For institutions which divide their academic year into standard quarter, semester, or trimester terms and which measure progress by quarter, semester, or trimester credits, a student must be enrolled for at least 12 quarter or semester hours per academic term.

C. For institutions which measure progress by quarter,

semester or trimester hours but which do not divide their academic year into specific terms, a student must be enrolled for 36 quarter hours or 24 semester or trimester hours per school year.

D. Students enrolled in a specially scheduled series of academic terms which are designed to provide a minimum of 12 quarter or semester hours during a period not exceeding 18 weeks would be considered full-time.

E. If an institution offers programs of study for which progress is measured in terms of a combination of credit hours and clock hours, contact the ADS Section of the Basic Grant Program for further guidance.

In addition to meeting the workload criteria, a full-time student must be charged the tuition and fees normally charged by the institution for a student who is taking a full-time course load.

Definition of three-quarter-time status. A three-quarter-time student is defined as a student carrying at least 75% but less than 100% of the full-time workload.

Definition of half-time status. A half-time student is defined as a student carrying at least 50% but less than 75% of the full-time workload.

Correspondence school students. Program regulations specify that in order for a student engaged in study by correspondence to be eligible as a half-time student, such study must require a minimum of 12 hours of preparation per week. Correspondence school students cannot be classified as more than half-time for purposes of the BEOG Program.

Summer terms prior to the regular academic year. **(Note:** This section applies only to term-based/credit-hour students.) The revised regulations provide that an institution which has terms and which measures progress by credit hours shall designate any term (e.g., a summer term) which begins in one award period and ends in the next award period as a part of either the first or the next award period. This designation must be the same for all Basic Grant recipients at the school. The calculation of the award for such a term will then be based on the Student Eligibility Report for the award period designated by the institution. Of course, the student may never receive more than one Scheduled Basic Grant during an award period. Payment for a summer term may result in a reduction in a later payment.

Enter the beginning and ending dates of the entire summer term or series of terms. Also enter the student's enrollment status over the entire summer session(s). In item 12A enter the tuition and fees which would be charged for a full-time student for the summer session(s) multiplied by the number of terms in an academic year.

Summer terms after the regular academic year. If the student attends summer term(s) or session(s) in the spring or summer (beginning before June 15, 1980) and will earn at least 6 credit hours, and if the student has not exhausted his or her maximum entitlement, (s)he may apply for payment for such summer term(s) up to the amount of entitlement remaining if this term has been designated as being eligible for payment in this award period.

11. **Termination Dates:** If the student has dropped out or his or her enrollment has been terminated before the ending date of the term or period specified in item 10, and if he

or she has met the deadline for submission of the Student Eligibility Report (SER) before such termination, the student may be eligible to receive a prorated payment for a portion of the term or clock hours credited to the student's program. In the case of a student who has terminated before the date of institutional certification, the institution should indicate the dates of the regular term (or program) in item 10, but should indicate in item 11 the student's last date of attendance, and, for clock-hour courses, the actual number of hours credited to the student's program between July 1, 1979 and June 30, 1980, in the blocks provided. Do not report a student's graduation date in this area. **Note:** It is the responsibility of the school to report to the Basic Grant Program any termination(s) of enrollment, official or unofficial.

12. **Student Cost Information:** There are three elements used to compute the total allowable cost for a student. These are (A) tuition and fees, (B) room and board cost or allowance, and (C) an allowance for books, supplies, and miscellaneous expenses. Note that the amounts you enter in these items will be used in calculating the student's award.

A. *Tuition and fees.* Enter the amount in item 12A of the OE Form 304 in accordance with the following instructions.

1. Do NOT include the cost of books, supplies, or miscellaneous expenses to the student as tuition and fees. These expenses are covered in a separate allowance.

2. Include as fees only those which are generally charged to all students or to a particular class of students of which the student is a member. (Examples: A parking fee is not allowed but a laboratory fee for

chemistry students is allowed. Tuition and fees may include travel costs within the U.S. if required for completion of the course of study, but not for travel between the student's residence and the institution, or for travel outside the U.S.)

3. In the unusual instance that an institution does not charge any tuition and fees, enter $0. Do not leave the item blank.

4. *For clock hour schools.* If you checked box C in item 9, the entry should reflect tuition and fees for the entire course. If the length of the student's program exceeds the length of the institution's normal academic year, the amount reported for tuition and fees will be prorated by the Commissioner in the following manner: Institutional charges for tuition and fees times (the number of clock hours in the institution's academic year divided by the number of clock hours in the entire program).

5. *For full-time students at term-based schools.* If you checked Box Q, S, or T in item 9, the entry should reflect actual tuition and fees for the term projected for an entire academic year (i.e., for 3 quarters or for 2 semesters or trimesters), even if the student is enrolled for less than the full year. (Example: Even if a student enrolls for the second semester only, enter the tuition and fees for 2 semesters.)

6. *For part-time students.* Enter in item 12A the amount which would normally be charged to a full-time student, NOT the amount of actual costs for the part-time student.

B. *Room and board.* Calculate the amount for room and board in accordance with the following instructions and enter that amount in item 12B. If the student is con-

tracting with the institution for room and/or board, the amount should be based on actual costs to a student for a normal academic year, even if the student is enrolled for less than the full year. If the student is not contracting with the institution, standard allowances are provided for living expenses. Students who are enrolled in correspondence courses, or who are incarcerated, are not ordinarily eligible to receive any room and board allowances, for exceptions, see item 3 below.

1. If the student is living at home or off campus and is not contracting with the institution to provide either room or board, enter the standard allowance of $1,100 for living costs. (Exception: For incarcerated individuals or correspondence school students, see item 3 below.)

2. If the student is contracting with the institution for room and/or board:

a. If the student is paying for both room and board through the institution, enter the cost for a full academic year.

b. If the student is paying for room only through the institution, enter the SUM of the cost of room for a full year plus $625 for standard board allowance (i.e., room cost + $625 = item 12B entry).

c. If the student is paying for **board only** through the institution, enter the SUM of the cost of board for a full year **plus** $475 for standard room allowance (i.e., board cost + $475 = item 12B entry)

3. If the student is enrolled in a **correspondence** course, or is **incarcerated,** enter $0 in item 12B. Exceptions: if a correspondence course involves a required period of residential training, actual contracted costs or a prorated standard allowance for room and board for

such period may be included. If less than one-half of room and board expenses is provided for an incarcerated student, actual contracted costs or a standard allowance may be included. See *ADS Handbook* for additional details.

C. *Allowance for books, supplies, and miscellaneous expenses.* Program regulations provide for a **standard allowance** of $400, except for two types of students

1. If the student is enrolled in a **correspondence** course, cross out the $400 allowance shown in item 12C and write in $0 above it. No allowance is provided for correspondence course students.

2. If the student is **incarcerated,** cross out the $400 allowance shown in item 12C and write in $150 above it. The allowable $150 is for books and supplies.

Unless the student is enrolled in a correspondence course or is incarcerated, (s)he is entitled to the **standard allowance** of $400 shown in item 12C. No justification of this amount is required and no other amount may be entered.

D. Enter in item 12D the sum of items 12A, 12B, and 12C. This sum will be used in calculation of the student's Scheduled Basic Grant award. The sum in item 12D is the same as the total student cost referred to in the Payment Schedule for the 1979-80 award period and is used to compute the Scheduled Basic Grant award. **Note:** For clock-hour students, if tuition and fees are prorated (see item 12, part A, number 4), the sum of the prorated amount for tuition and fees plus the room and board amount plus the standard allowance for books and miscellaneous expenses will be used to determine the student's Scheduled Basic Grant award.

13. **Certification by Institutional Official.** The certification must be signed and dated by the institutional official who completes Part B. Requests for Payment cannot be processed unless the institution's certification is dated on or after the date the student begins attending classes.

Basic Grant regulations stipulate that the student must be enrolled in an eligible program. The definition of an eligible program in a public or nonprofit private college, university, junior college, community college, or vocational school is an undergraduate program of education or training which (1) admits as regular students only persons who have a certificate of graduation from a secondary school (high school graduates), or have the equivalent of a high school diploma or a General Education Development (GED) Certificate, or are beyond the age of compulsory school attendance in the State in which the institution is located and may benefit from the education or training offered, (2) leads to a bachelor's, associate, or undergraduate professional degree, is acceptable for full credit toward a bachelor's degree, or is at least a 1-year program leading to a certificate or degree which prepares students for gainful employment in a recognized occupation. An eligible program in a proprietary institution of higher education is an undergraduate program of education or training which (1) admits as regular students only high school graduates or those having a recognized equivalent, (2) leads to a degree or certificate, (3) prepares students for gainful employment in a recognized occupation, and (4) is at least a 6-month program as described in the *ADS Handbook*.

If the student does not meet the criteria specified in the certification, the student is not eligible to receive a BEOG award. In such a case, the institution should not

sign the certification, but should notify the student that (s)he has not met the specified criteria. If the student has a question about your determination, (s)he may write to BEOG Program, ADS Section, R.O.B. 3, 400 Maryland Avenue S.W., Washington, D.C. 20202.

After you have completed the certification, return the form to the student, who will then submit it for payment: The student will be notified of the result of the request and payment will be made directly to the student by the U.S. Treasury Department.

Exhibit C — OE Form 304
attached to Crill Affidavit.

Department of Health, Education and Welfare
U.S. Office of Education
Form Approved — OMB No. 51-R0989

OE Form 304

Request for Payment of BEOG Award 1979-80 Academic Year
Basic Educational Opportunity Grant Program

This form is to be used only by students attending eligible institutions which have entered into an Alternate Disbursement System agreement with the U.S. Commissioner of Education by which the Commissioner will determine and make awards for the Basic Educational Opportunity Grant Program. Part A is to be completed by the student and Part B by the institution. No grant award will be made unless a completed application form has been received (20 U.S.C. 1070a, 45 C.F.R. 190.86).

Instructions for completing OE Form 304

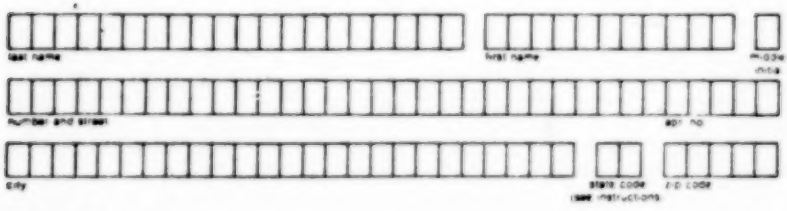
Part A—To Be Completed by the Student Applicant

Read page 1 of the instructions before completing this part. Please type or print clearly using block letters.

Applicant Identification

1. Social Security Number ☐☐☐ ☐☐ ☐☐☐☐

2. Name



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3. Present Mailing Address. Enter address to which any payments due you should be mailed. If you change your address after submitting the OE Form 304, notify your local post office so that any payments/correspondence may be forwarded. In addition, notify BEOG, P.O. Box K, Iowa City Iowa 52243 of your new address in writing.

4. Permanent Mailing Address
if different from above

---

number and street apt. no

---

city state zip code

Telephone No. _____ _____
area

OE Form 304

Request for Payment

I am hereby submitting with this form one copy of my Student Eligibility Report (SER) (which only needs to be completed as far as Section 2).

I request that the amount of my BEOG award for the academic year 1979-80 be determined, and that the first payment be made to me based on information submitted with this form.

I CERTIFY that (1) I do not owe a refund on any grant previously received for attendance at the institution (as named in Part B) under the Basic Educational Opportunity Grant Program, the Supplemental Educational Opportunity Grant Program, or the State Student Incentive Grant Program, and (2) I am not in default on any loan from a student loan fund at the institution (as named in Part B) made under the National Direct Student Loan Program, or made, insured, or guaranteed by the U.S. Commissioner of Education under the Guaranteed Student Loan Program.

Student Affidavit

I hereby affirm that any funds received under the Basic Educational Opportunity Grant Program will be used solely for expenses related to attendance, or continued attendance, at the institution named in Part B.

Further, If my enrollment should be terminated for any reason during an award period for which I have received (or applied for) payment of BEOG award, I understand that I am responsible for repayment of a prorated amount of that payment, to be determined by the U.S. Commissioner of Education. I understand that the institution is responsible for notifying the Basic Grant Program (ADS Section), R.O.B. 3, 400 Maryland Avenue S.W., Washington, D.C. 20202, of any such termination in writing.

OE Form 304

5. Applicant's Signature

_____ Date_____

(Sign only in presence of notary)

6. Notary Public

Subscribed and sworn before me this

_____ day of _____, 19____ SEAL

Signature of Notary Public _____

Address of Notary Public _____

My Commission expires _____

Be sure that you sign your "Request for Payment" and attach one copy of your SER before mailing.
Both the SER and OE Form 304 should be mailed to:
BEOG, P.O. Box K, Iowa City, Iowa 52243.

OE FORM 304 (4/79)
PREVIOUS EDITION IS OBSOLETE AFTER 06/30/79

OE Form 304

Part B—To Be Completed by the Institutional Official

Read pages 2 through 4 of the instructions before completing this part.

Identification

7 Name of Institution. Please print. _____

Address of institution. _____ (Number and street) _____ (City) _____ (State) _____ (Zip code)

8 **BEOG ID No.** ☐☐☐☐☐☐☐☐☐☐ (Numbers taken OE Vendor Code)

Data for Calculation of Award

9 **Institution's Academic Calendar.** Check only one box. See instructions on page 2 before completing.

C ☐ Clock-hour System Q ☐ Quarter System S ☐ Semester System T ☐ Trimester System

10 **Transfer Dates.** If the student attended an institution other than the institution indicated in item 7 above on or after July 1, 1979, please indicate the name of the school, the state, and the dates of attendance since July 1, 1979, at the other institution.

Name _____ State _____ Beginning date (month, day, year) ☐☐ ☐☐ ☐☐ Ending date (month, day, year) ☐☐ ☐☐ ☐☐

Complete either 10A or 10B below, but not both. See instructions on pages 2 and 3.

10A Clock-hour institutions. If you checked box C in item 9 above, complete 1, 2, 3, and 4 below.

(1) How many total clock hours are in the student's ENTIRE program? ☐☐☐☐☐

(2) How many hours per week and how many weeks is the student expected to complete in the award period (07/01/79-06/30/80)? ☐☐ hours ☐☐ weeks

(3) What is the length in clock hours of the student's academic year? See definition of academic year. ☐☐☐☐☐

(4) Enter the student's beginning and anticipated ending dates of attendance.
Beginning date of course (month, day, year) ☐☐ ☐☐ ☐☐ Ending date of course (month, day, year) ☐☐ ☐☐ ☐☐

10B Term-based institutions. If you checked box Q, S, or T in item 9 above, complete 1 and 2 below.

(1) Enter the beginning and ending dates of the FIRST quarter, semester, or trimester which the student attended or is attending, or part of which falls within the current award period. (The current award period extends from 07/01/79 through 06/30/80.) Do not report the entire year.
Beginning date of term (month, day, year) ☐☐ ☐☐ ☐☐
Ending date of term (month, day, year) ☐☐ ☐☐ ☐☐

(2) Status. Check the student's attendance status for the term specified above.
F ☐ full time T ☐ three-quarter time H ☐ half time

11. Termination Dates. Enter the student's last day of attendance if he or she has dropped out of school. See instructions on page 3 before completing.

(month, day, year) ☐☐ ☐☐ ☐☐ Hours actually credited to student's program (if study of this award period is 07/01/79-06/30/80) ☐☐☐☐

12 Student Cost Information. Complete items A, B, C, and D in accordance with the instructions on pages 3 and 4; do not leave any items blank.

A. Tuition and fees. See item 12A instructions on pages 3 and 4. A $ ☐☐☐☐ .00

B. Room and board. See item 12B instructions on page 4. B $ ☐☐☐☐ .00

C. Allowance for books, supplies, and miscellaneous expenses. The standard allowance is $400. However, if the student is enrolled in a correspondence course or is incarcerated, check here ☐ cross out the $400 allowance shown, and see item 12C instructions on page 4 for the amount to be entered. C $ 4 0 0 .00

D. Total allowable student costs for the full academic year. Enter the sum of the amounts in A, B, and C above. D $ ☐☐☐☐ .00 TOTAL

Certification by Institutional Official

I certify that, to the best of my knowledge, the above information is correct and the applicant named in Part A is an eligible student.

The student is (or will, actually, attending classes in an eligible program as of the beginning dates shown in item 10 above and is maintaining satisfactory academic progress, and has not terminated his or her enrollment as of the date of this certification (or the student has terminated enrollment before this date; refer to page 3 of the instructions).

13 **Signature of Institutional Official** _____ Date (month, day, year) ☐☐ ☐☐ ☐☐

Title _____ Telephone No. (area code) _____

★ U.S. GOVERNMENT PRINTING OFFICE: 1979 O — 281-555

AFFIDAVIT OF MARIANNE SICKAFUSE, DATED 7/31/79

AFFIDAVIT OF MARIANNE SICKAFUSE
IN SUPPORT OF MOTION.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Civil Action No.
78-1293

GROVE CITY COLLEGE, Individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH; and VICTOR E. VOUGA,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; DAVID TATEL, Director of the United States Office for Civil Rights,

Defendants.

MARIANNE SICKAFUSE, being duly sworn, says:

1. I am a plaintiff in the above-captioned action, and I make this affidavit in support of plaintiffs' motion.

2. I am a full-time student at Grove City College and a recipient of a Basic Educational Opportunity Grant totaling $400 for the academic year 1978-79.

3. In February 1978, I obtained a Financial Aid Form for the academic year 1978-79. The Financial Aid form is a document of the College Entrance Examination Board, a private corporation located in Princeton, New Jersey which

administers the College Entrance Examination and which provides a clearinghouse for financial aid information for colleges. The Financial Aid form is used for and financial aid programs administered by Colleges and Universities, for many State scholarships and for the federal Government's Basic Educational Opportunity Grant program. A sample is attached as Exhibit A.

4. I completed the Financial Aid Form as directed, and specifically completed Items 83 and 84, authorizing release of the form to the BEOG program. I then mailed the completed form directly to Princeton, N.J. Grove City College was not involved.

5. Later in 1978, I received from the BEOG Program a form identified as a Student Eligibility Report ("SER"). The SER summarized the data I submitted in my application form, and indicated whether I was eligible, in terms of financial need, for receiving a BEOG. The SER also set out an "eligibility index", which I understood would be used in computing the eventual amount of my BEOG award.

6. Thereafter, I also obtained a "Request for Payment of BEOG Award" (OE Form 304, called in this affidavit the "Request") and accompanying instructions. I understood from the instructions that because Grove City College would not process or render a BEOG award directly, I should complete the request, obtain certification from the College, and mail the Request directly to the Basic Grants Program. Accordingly, I completed Part A of the Request and took the Request to the College Financial Aid Office. While I waited, a College official completed Part B of the Request, which certified the tuition, room, and board costs charged to me, as well as the fact that I was an enrolled student at the College. I understood that the college made no decision as to my eligibility and limited its participation to providing the information requested on Part B

of the Request. I then mailed the completed Request (attached as Exhibit B to this Affidavit), to the Basic Grants Program in Iowa City, Iowa.

7. Some time afterward, I received from the Basic Grants Program a notice indicating the BEOG award I could expect to receive, and instructions that a United States Treasury Check would be sent to me under separate cover.

8. In December, 1978 I received a United States Treasury check for $204 payable directly to me. In March of 1979, I received a second check for $204 which completed the award for 1978-79. Because Grove City College requires full payment of all charges before classes begin, I used the $408 at my discretion to pay various educational expenses, including money I borrowed to pay tuition at the semesters beginning.

9. Among the reasons I chose to attend Grove City College were the civic and religious principles which guide its educational philosophy. Unless I continue to receive BEOG awards, I will be financially unable to continue at the College.

/s/ MARIANNE SICKAFUSE

Subscribed and sworn to before
me on July 31, 1979.

Carl M. Sautter,
Notary Public
CARL M. SAUTTER, Notary Public
Grove City, Mercer Co., Pa.
My Commission Expires Sept. 5, 1981

[Exhibits omitted]

AFFIDAVIT OF KENNETH J. HOCKENBERRY, DATED 8/2/79

AFFIDAVIT OF
KENNETH J. HOCKENBERRY
IN SUPPORT OF MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Civil Action No.
78-1293

GROVE CITY COLLEGE, Individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH; and VICTOR E. VOUGA,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare; DAVID TATEL, Director of the United States Office for Civil Rights,

Defendants.

KENNETH J. HOCKENBERRY, being duly sworn, says:

1. I am a plaintiff in the above-captioned action, and I make this affidavit in support of plaintiffs motion.

2. I am a full-time student at Grove City College and a recipient of a Basic Educational Opportunity Grant totaling $654, as well as a Guaranteed Student Loan ("GSL") totaling $2000 for the academic year 1978-79.

3. In January, 1978, I received a New Jersey Financial Aid

Form for the academic year 1978-79. The 1979-80 form is attached as Exhibit A; it is the same as the form which I received last year. It is a document of the College Entrance Examination Board, the private corporation which provides a clearinghouse for financial aid information. I am aware that the Form is used for many financial aid programs administered by colleges and universities, for State financial aid programs and, upon authorization by the Student, for the federal government's Basic Educational Opportunity Grant program.

4. Together with my parents, I filled out the application form, including financial information which I understood would in part determine my eligibility for a BEOG. I mailed the completed form to C.E.E.B. in Princeton. Grove City College did not participate.

5. Later in 1978, I received from the BEOG Program a form identified as a Student Eligibility Report ("SER"). The SER summarized the data I submitted in my application form, and indicated whether I was eligible, in terms of financial need, for receiving a BEOG. The SER also set out an "eligibility index", which I understood would be used in computing the eventual amount of my BEOG award.

6. Thereafter, I also obtained a "Request for Payment of BEOG Award" (OE Form 304, called the "Request" in this Affidavit) and accompanying instructions. I understood from the instructions that because Grove City College would not process or render a BEOG award directly, I should complete the request, obtain certifications from The College, and mail the Request directly to the Basic Grants Program. Accordingly, I completed Part A of the Request and took the Request to the College Financial Aid Office. While I waited, a College official completed Part B of the Request, which certified the tuition, room, and board costs charged to me, as well as the fact that I was an enrolled student at The College. I understand that The

College made no decision as to my eligibility and that it limited its participation to providing the information desired in Part B of the Request. I then mailed the completed Request (attached as Exhibit B to this Affidavit) to the Basic Grants Program in Iowa City, Iowa.

7. Some time afterward, I received from the Basic Grants Program a notice indicating the BEOG award I could expect to receive, and instructions that a United States Treasury Check would be sent under separate cover.

8. As of the date of this Affidavit, I have not yet received the check promised. Upon inquiring, I was told that my application had been randomly selected for audit. I still do not know when my check will arrive.

9. The GSL I received was also obtained without any active participation by The College. About May 1978, I picked up a Higher Education Loan Program application form from the United Jersey Bank in Dover, New Jersey. I was informed that I was eligible to obtain a GSL from the bank, provided that I secure approval from the New Jersey Office of Student Assistance.

10. I filled out the form, had it notarized, and thereafter mailed it to the College, where, upon information and belief, the section requiring certification that I was an enrolled student, as well as the cost of tuition, room, and board to be charged to me, was filled out by the College. I believe the application form was returned to the bank, which then mailed the form directly to the Office of Student Assistance, New Jersey Department of Higher Education, 225 West State Street, Trenton, New Jersey 08625.

11. In July 1978 later, I received notification from the Office of Student Assistance that my loan application would be guaranteed by New Jersey through the Higher Education Loan

Affidavit of Kenneth J. Hockenberry, dated 8/2/79

Program. I returned the notification to Bank, agreed on a repayment schedule and received a check for $2000. I used the $2000 to pay various educational expenses, including tuition, room and board.

12. I chose to attend Grove City College because of the civic and religious principles which guide its educational philosophy. I understand from the decision of Administrative Law Judge Albert Feldman dated September 16, 1978, that should I continue to attend Grove City College, I will be unable to receive funds from GSL and BEOG awards. Unless I continue to receive those funds, I will be unable to continue in attendance at the college of my choice.

/s/ KENNETH J. HOCKENBERRY

Subscribed and sworn to
before me on 8/2/79, 1979.

/s/ GEORGE L. WEGER, JR.
Notary Public

GEORGE L. WEGER, JR.
Notary Public of New Jersey
My Commission Expires March 21, 1982

[Exhibits omitted]

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No. 82-792

In the Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Grove City College is a recipient of "Federal financial assistance," as that term is used in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and is thus subject to the requirement that it execute an "Assurance of Compliance" with Title IX.

2. Whether the application of Title IX regulation to the College infringes the First Amendment rights of the College or its students.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-792

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-44) is reported at 687 F.2d 684. The opinion of the district court (Pet. App. A-45 to A-86) is reported at 500 F. Supp. 253.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982. The petition for a writ of certiorari was filed on November 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Grove City College ("Grove City" or "the College") and several of its students brought this action seeking a declaratory judgment that the College is not subject to Title IX of the Education Amendments of 1972, 20

U.S.C. 1681 *et seq.* ("Title IX"), and an injunction prohibiting the Department[1] from terminating federal grants paid to students at the College.

1. A substantial number of Grove City's students use federal grants to help finance their education at Grove City. The Basic Educational Opportunity Grant program (BEOG), 20 U.S.C. (Supp. V) 1070a, provides grants of up to $1800 to those students who meet the program's family income and need standards. Grove City does not wish to participate directly in the receipt and distribution of federal funds; its students therefore participate in the BEOG program through the "alternate disbursement system" (ADS), which allows grants to be paid directly to students following certification by the College.[2] The applicable Title IX regulation, 45 C.F.R. 86.2(g)(1)(1979), includes within its definition of "Federal financial assistance" grants extended directly to students for payment to an institution. Therefore, in July 1976, the Department undertook to obtain from the College the "assurance" (required by 45 C.F.R. 86.4 (1979)) that it would comply, "to the extent applicable to it, with Title IX * * * and all applicable" regulations (Pet. App. A-126).

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[1]As noted in the petition for writ of certiorari (page 2 n.1), at the time petitioners filed their complaint, the Department of Health, Education and Welfare (HEW) was responsible for the administration of Title IX regulations relating to the federal programs involved here. These functions of HEW under Title IX were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677-678. Like petitioners, we refer to HEW and the Department of Education as "the Department."

[2]Compare 45 C.F.R. 190.91 (1979) (ADS) with 45 C.F.R. 190.71 (1979) (regular disbursement system). Like petitioners (see Pet. 2 n.1, 3 n.4), we cite to the earlier version of the regulations, found at 45 C.F.R. Following establishment of the Department of Education, these regulations were recodified in 34 C.F.R.

After the College repeatedly refused to execute the assurance form, the Department instituted administrative enforcement proceedings. After a hearing,[3] an administrative law judge ruled (Pet. App. A-89 to A-98) that the College was a recipient of federal financial assistance within the meaning of Title IX and that its failure to execute the Assurance of Compliance constituted a violation of the Title IX regulations. The administrative law judge ordered the Department to terminate assistance for Grove City students under the BEOG and Guaranteed Student Loan programs until the College "satisfi[ed] the Department that it is in compliance" with Title IX (*id.* at A-97).

In November 1978, the College and several of its students filed this action in the United States District Court for the Western District of Pennsylvania. On cross-motions for summary judgment, the district court upheld the classification of Grove City College as a recipient of federal financial assistance for purposes of Title IX (Pet. App. A-67 to A-74). However, the district court on a variety of grounds excused the College from signing the Assurance of Compliance, and it enjoined the Department from terminating federal assistance to the College.[4] Both the Department and the College appealed.

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[3]The sole issue at the hearing was whether the College was a recipient of federal financial assistance. Because the question whether there was actual discrimination by the College was not at issue, neither party offered evidence on that subject.

[4]First, the district court held that, although Guaranteed Student Loans constitute federal financial assistance within the meaning of Section 901 of Title IX, 20 U.S.C. 1681, they cannot be terminated because they are a "contract of insurance or guaranty" within the meaning of Section 902 (Pet. App. A-69 to A-70, A-75 to A-76). On appeal the Department did not take issue with this portion of the district court judgment. Second, the court concluded that the portions of the Department's regulations relating to employment discrimination were invalid, so that the College could not be required to sign an assurance

2. The court of appeals affirmed in part and reversed in part. It affirmed the district court's conclusion that federal student aid made the College a recipient of federal financial assistance within the meaning of Title IX. In support of its conclusion, the court of appeals cited the language of the statute (Pet. App. A-11 to A-12), the contemporaneous legislative history (*id.* at A-12 to A-15), post-enactment legislative action (*id.* at A-16 to A-20), and case law under Title VI of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000d *et seq.* (Pet. App. A-21 to A-22).

Further, the court of appeals rejected Grove City's argument that, since federal student aid is not earmarked for any specific educational activity, applying Title IX to this case would necessarily be inconsistent with the "program-specific" nature of Title IX. Two members of the panel went on to conclude, in extensive dicta, that when the federal government furnishes non-earmarked aid to an institution, the institution as a whole is the "program" receiving federal financial assistance (Pet. App. A-23 to A-31). Judge Becker, the third member of the panel, found this conclusion to be unnecessary to the decision. Judge Becker noted simply that non-earmarked student aid is not necessarily incompatible with program specificity and that it is "incorrect to contend that the more general the scope and purpose of the funding the more restrictive the coverage of this remedial civil rights statute" (*id.* at A-43).

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that it would comply with those provisions (*id.* at A-76 to A-78). But see *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982) (upholding the validity of the employment regulations). Third, the court held that under the Due Process Clause of the Fifth Amendment the Department may not terminate BEOGs without first affording hearings to all students who would be adversely affected (Pet. App. A-78 to A-79). Finally, the court concluded that termination could not be based upon refusal to sign an assurance, but must rest upon a finding of actual discrimination (*id.* at A-79 to A-84).

The court of appeals also rejected Grove City's argument that compliance with Title IX would infringe upon the First Amendment rights of the College and its students, holding that Congress has the power to impose reasonable conditions upon grants of federal financial assistance (Pet. App. A-32 to A-33). In any event, since both the College and its students could avoid the requirements of Title IX by forgoing federal assistance, the court concluded that their constitutional rights were not infringed (*id.* at A-33).

The court of appeals also held that, in view of this Court's intervening decision in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), upholding the validity of the Department's regulations applying Title IX to employees, the district court's holding that the invalidity of those regulations excused the College from executing the assurance could not stand (Pet. App. A-34 to A-35). In addition, the court of appeals concluded that the district court erred in holding that assistance could be terminated only upon a finding of actual discrimination. It found that the Department's regulation requiring the execution of an Assurance of Compliance was valid. Consequently, since the statute permits termination for failure to comply with any regulation designed to effectuate the objectives of Title IX, failure to execute the assurance was a proper basis for termination (*id.* at A-35 to A-37). Finally, the court of appeals held (*id.* at A-38 to A-39) that the district court's order enjoining the Department from terminating student aid without affording hearings to affected students was inconsistent with this Court's ruling in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), and therefore must be reversed.

ARGUMENT

Petitioners devote virtually all of their attention to an issue that is not presented by this case — the meaning of the concept of "program specificity" under Title IX. As Judge

Becker observed in his concurring opinion (Pet. App. A-40 to A-44), much of the discussion of program specificity in the opinion of the other two panel members is quite unnecessary to the decision reached by the court; in effect, petitioners seek to have this Court review statements that constitute dictum. Those statements are inappropriate for review, because they have no effect on the outcome of the case.

The actual holding of the court of appeals is that Grove City must file the Assurance of Compliance required by the Title IX regulations because the College is a recipient of federal financial assistance within the meaning of Title IX by virtue of its participation in the Department's BEOG program. This holding does not conflict with any decision of this Court or with the decision of any other court of appeals. Moreover, petitioners offer little argument or authority in support of a challenge to the holding.[5] Thus, the decision of the court below does not warrant further review.

1. Petitioners do not seriously dispute the court of appeals' holding that the language of Title IX and its legislative history (Pet. App. A-11 to A-20), as well as case law interpreting the analogous provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000d *et seq.*

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[5]The cases cited by petitioners do not address the question whether an institution can be a recipient of federal financial assistance by virtue of participation in a federal student aid program. In *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982), the issue was whether alleged sex discrimination in the award of grades was supported by federal assistance. In the three district court opinions cited by petitioner (Pet. 11, 15), the question was whether intercollegiate athletics constituted a program or activity receiving federal financial assistance. Finally, in *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the issue was whether all types of federal financial assistance could be terminated after a finding that a school district had violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000d *et seq.*

(Pet. App. A-21 to A-22), support the conclusion that Grove City, as an indirect recipient of federal funds through the BEOG student aid program, is a recipient of federal financial assistance within the meaning of Title IX. That conclusion is consistent with the holding of the one other court of appeals that has been squarely confronted with the issue. See *Hillsdale College* v. *HEW*, No. 80-3207 (6th Cir. Dec. 16, 1982).[6] In that case, the Sixth Circuit concluded that Hillsdale College, which receives no federal financia' aid except through its participation in student aid programs, is a recipient of federal financial assistance within the meaning of Title IX.[7] No court of appeals has held that participation by a college or university in the BEOG program is insufficient to bring it within the coverage of Title IX.

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[6]We have provided copies of the Sixth Circuit's opinion in *Hillsdale College* to the Court and to counsel for petitioners.

As pointed out in that opinion (at 1 n.*), Judge Cecil concurred in that opinion prior to his death on November 26, 1982.

[7]The Sixth Circuit also concluded that the Department could not require Hillsdale College to execute an Assurance of Compliance so long as the assurance would be applied to the entire college rather than to particular programs receiving federal funds. The *Hillsdale* court misapprehended the Department's position. The Department does not take the position that execution of an assurance acknowledges coverage of an entire institution regardless of the nature of the federal financial assistance received by that institution. The Department believes that assurances of compliance must be written and construed so as not to apply automatically to an institution as a whole, but only to those programs and activities of an institution that receive federal financial assistance. Petitioners' contention that the Department is applying different standards to educational institutions in different circuits (Pet. 18-19) is, therefore, incorrect. *University of Richmond* v. *Bell*, 543 F. Supp. 321 (E.D. Va. 1982), cited by petitioners in support of their contention, did not raise the question whether the Department could require execution of an Assurance of Compliance; in that case the school had already executed an Assurance.

Instead of addressing the meaning of federal financial assistance under Title IX, petitioners focus on the dicta of two judges in part III of the majority opinion below. To the extent that those dicta suggest that all activities of the institution are covered whenever any student receives any federal funds (because the entire institution automatically becomes the funded "program"), there is serious doubt whether they can be reconciled with this Court's statements in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 24-28. They are also inconsistent with the decisions of several other courts of appeals. See *Hillsdale College* v. *HEW*, *supra*; *Dougherty County School System* v. *Bell*, No. 78-3384 (5th Cir. Dec. 20, 1982); *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982).[8]

Nevertheless, this is not, in our view, the proper case in which to resolve inconsistencies in statements by the courts of appeals concerning the meaning of the program-specific limitation found in Title IX. The narrow question before the court of appeals was whether Grove City is a recipient of federal financial assistance and is thus subject to the requirement that it execute an Assurance of Compliance. The ruling that receipt by its students of federal student aid makes Grove City such a recipient is clearly correct and not seriously controverted.[9] That ruling does not warrant

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[8]See also *University of Richmond* v. *Bell*, *supra*; *Bennett* v. *West Texas State University*, 525 F. Supp. 77 (N.D. Tex. 1981), appeal pending, No. 81-1398 (5th Cir.); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981), appeal pending, No. 81-1259 (6th Cir.).

[9]The court of appeals was also clearly correct in rejecting Grove City's argument that in cases involving indirect or unearmarked federal aid, any application of Title IX would *necessarily* violate requirements of program specificity, and that therefore there is no program at Grove City that could be subject to Title IX coverage. No court of appeals has accepted any such argument. But the panel's further conclusion, that

review; and this case does not provide an appropriate occasion for review of wider issues relating to program specificity.[10]

2. Petitioners suggest (Pet. 15-16) that subjecting the College to Title IX may infringe the First Amendment rights of the College and its students to academic freedom. The suggestion is without merit. As the court of appeals recognized (Pet. App. A-32 to A-33), Congress has the power to fix the terms upon which it disburses federal financial assistance (e.g., *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981)), and the requirement that such assistance not be spent in furtherance of sex discrimination is undoubtedly a reasonable requirement. So long as the College is free to avoid the conditions by withdrawing from the BEOG program, and students are free to attend the College, albeit without the aid of federal grants, no one's constitutional rights have been violated. See *Norwood* v. *Harrison*, 413 U.S. 455, 461-463 (1973); *North Carolina* v. *Califano*, 445 F. Supp. 532, 535-536

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the entire institution is the only possible candidate for a program subject to Title IX coverage in such a situation, is far broader than necessary to decide this case. As Judge Becker noted, narrower interpretations of program specificity are available. See also *Hillsdale College* v. *HEW*, *supra*, slip op. 22, 23-24 (college's participation in federal student aid program subjects its student loan and grant program to Title IX requirements).

[10]Since *Grove City*, the Third Circuit has decided *Haffer* v. *Temple University*, 688 F.2d 14 (1982). The panel in *Haffer* applied the dictum from *Grove City* and held that the university's participation in the BEOG program was sufficient to subject the entire university, including its intercollegiate athletics program (which did not receive any direct federal grants), to Title IX coverage. The resulting conflict among the courts of appeals as to the proper interpretation of program specificity is, however, not presented in this case.

(E.D. N.C. 1977), aff'd mem., 435 U.S. 962 (1978). Petitioners' contention does not warrant further review.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

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[11]Petitioners also present for review the question whether the Department may terminate assistance because of a college's refusal to execute an Assurance of Compliance, rather than because of a finding of actual discrimination; but this question is not discussed in the body of the petition. The court of appeals' conclusion on this point is consistent with a Title VI case decided before the passage of Title IX, *Gardner* v. *Alabama*, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968), and does not conflict with any decision of this Court or any court of appeals. Thus this question does not warrant review.

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In The

Supreme Court of the United States

October Term, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

PETITIONERS' REPLY BRIEF

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ARGUMENT

A. *The Meaning of Program-Specificity under Title IX is Squarely Raised.*

The government in its brief in opposition to the petition for certiorari continues a course of calculated obfuscation which not only does injustice to the Petitioners, but does injustice also to the Third Circuit which relied on the interpretation of Title IX advanced by the government before it. The government now concedes the Third Circuit reached an erroneously broad interpretation of Title IX, yet asks this Court to ignore the error, deny review, and thus terminate aid to innocent students, despite the opposite conclusion of another Court of Appeals on the same matter. *See Hillsdale College v. HEW*, No. 80-3207 (6th Cir. Dec. 16, 1982) (hereinafter *"Hillsdale"*). The government urges this position, it submits, because the Third Circuit's holding (as opposed to its reasoning) is correct and "not seriously dispute[d]" by the Petitioners, who are said to urge issues before this Court which are not presented by the case.

The government misconstrues the issues presented, as well as Petitioners' position. Petitioners query whether a private college which itself neither receives nor distributes federal aid, but whose students receive direct federal grants, can nonetheless be subject to regulation under a statute which applies only to an "education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). Contrary to the government's claim, the meaning of "program-specificity" under Title IX is squarely raised by this question.

As correctly perceived by both the Third Circuit majority and Judge Becker's concurring opinion (A31; A43), the crucial question Petitioners raise is how to reconcile regulation of a college which concededly operates no program receiving federal funds with Title IX's program-specific command. Recognizing that federal assistance given directly to students could not be tied to any specific program at Grove City, both

the Third Circuit majority and Judge Becker's concurring opinion concluded that program-specificity could not be satisfied by accepting the government's facile argument, repeated before this Court, that Grove City becomes a recipient of "Federal financial assistance" under Title IX merely because it benefits from students' use of federal money for tuition payments, and that therefore once its recipient status is assumed, program-specificity is irrelevant and the College is perforce required to execute an Assurance of Compliance with Title IX. The government's argument fails because, unless one considers the entire college to be a program, there is no program capable of being regulated under Title IX.[1].

Both the Third Circuit majority and Judge Becker's concurrence recognized this conundrum and concluded that finding Grove City to be a recipient of "Federal financial assistance" required, *in the first instance,* resolution of the meaning of "program-specificity" under Title IX. Once having correctly perceived that program-specificity had to be confronted, both the Third Circuit majority and Judge Becker ultimately concluded that the only means of reconciling Title IX coverage over Grove City with program-specificity was to hold the entire institution to be a program subject to Title IX. (A31, n. 28; A43)[2].

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[1]Unlike the circumstances in *Hillsdale College,* there are no "campus-based" student assistance programs in existence at Grove City. Therefore the Sixth Circuit's conclusion that the Hillsdale campus-based grant and loan programs are subject to Title IX, while indisputably correct, has no application to the direct student grants at issue herein.

[2]The government is simply wrong when it tries to draw a distinction between Judge Becker's treatment of program-specificity and that of the majority. As the Third Circuit majority recognized (A31-32, n. 28):

> Despite Judge Becker's claims that we ought not to address anything other than refusal to execute the Assurance of Com-

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As the government itself concedes (Brief at 8), this institutional approach of the Third Circuit markedly conflicts with *North Haven Board of Education v. Bell*, ____ U.S. ____, 102 S. Ct. 1912, 72 L.Ed.2d 299 (1982) (hereinafter *"North Haven"*). Rather than confront the issues raised by the Third Circuit's error, however, the government now asks this Court to assume the very jurisdictional issue which is at the heart of the case — whether, despite the fact that it neither receives nor distributes assistance, Grove City was properly characterized as a recipient of "Federal financial assistance" within the meaning of Title IX.

Petitioners seriously dispute the government's and the Third Circuit's conclusion that it is such a recipient and maintain that their conclusion rests on an illogical and fallacious interpretation of Title IX program-specificity. The only logical reconciliation of direct student aid with program-specificity is to hold that, within the meaning of Title IX, direct student grants do not constitute "Federal financial assistance" to the educa-

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—Footnote continued from preceding page

pliance, he too agrees that we must respond to Grove's primary argument that "Program-specificity cannot co-exist with a construction of Title IX that subjects Grove to regulation because of its receipt of [non-earmarked] BEOG Funds." Concurring op. typescript at 3. He would answer that argument precisely as did the amicus in its brief we have quoted, *see* typescript at 26, *supra*. The answer thus given in the concurring opinion is no different than the answer we have been obliged to provide, and which appears in text above. Our answer, which also subscribed to the *amicus* argument, and Judge Becker's endorsement of that argument, reveal no difference in the conclusions reached: namely, that where indirect, non-earmarked funding is involved, the "Program" must necessarily embrace the entire college. Moreover, just as we have concluded that we are obliged to answer Grove's argument, Judge Becker also recognizes that this argument made by Grove must be answered.

tional institution.[3] The only alternative is to accept the Third Circuit's reasoning and give Title IX institutional scope, a conclusion clearly rejected by Congress.

Instead of considering direct federal assistance to students to be "Federal financial assistance" to the educational institution, Petitioners submit that those portions of student grant proceeds which are ultimately paid to Grove City should be considered payments for educational services, much in the same manner that social security recipients spend their government funds for food, rent, and other expenses.[4] In that situation it has never been seriously argued that this makes the grocery store or the landlord a recipient of federal aid. *Accord, University of Richmond v. Bell,* 543 F. Supp. 321, 330 (E.D. Va. 1982). The Third Circuit disagreed, relying substantially on post-enactment legislative history to find a purported Congressional intent to include direct student aid within the ambit of Title IX. (A16-20).

---

[3]We urge the Court also to reject the equation of "indirect" and "non-earmarked" aid engaged in by the Third Circuit and Amici below. (A27). There can be little doubt that if the government provided the College with a blanket grant of aid to spend at its discretion, then the institution itself would logically be the "program" receiving Federal financial assistance. There is no such blanket aid at issue herein. Moreover, to equate the BEOG grants, which are used by students at virtually every college or university in the United States, with such non-earmarked direct assistance would write program-specificity out of the Title IX and gut the regulatory limitation imposed by Congress. The Third Circuit and Amici have in any event created a straw man. Historically, federal aid to higher education has been extended either in programmatic grants or in the form of student assistance. When student assistance is extended directly to students without the intervention, selection, or control of the educational institution, there can be no program at the educational institution which is subject to Title IX regulation.

[4]Students receiving BEOG grants have virtually unlimited discretion to spend those grants for any educational purpose. They do not have to be spent for tuition or any institutional charges. *See* 34 C.F.R. §690.51(1981).

Contemporaneous legislative history, however, demonstrates a different intent. Petitioners submit that Congress by its conscious use of program-specific language meant to exclude from Title IX those forms of aid where the government pays the individual recipient directly without the intervention, selection, or control of the educational institution.

That legislative history, while admittedly sparse, is nonetheless illuminating. *See Hillsdale,* slip op. at 15; *Rice v. President and Fellows of Harvard College,* 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 1976, 72 L.Ed.2d 444 (1982). Senator Bayh, the chief Senate sponsor of Title IX, stated his contemporaneous view as to the scope of Title IX application as follows:

> It is unquestionable in my judgment, that this would not be directed at specific assistance that was received by individual students, . . .

117 Cong. Rec. 30408 (1971). Later, amplifying on this remark, Bayh engaged in the following colloquy during Congressional oversight hearings on the Title IX regulations:

> Mr. Quie. I am talking about whether the Department of Health, Education, and Welfare has overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.
>
> Senator Bayh. You know, I just don't know. I would have to look that up if you would like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.
>
> Mr. Quie. But I have heard it claimed that that is one of the reasons why they have jurisdiction.
>
> Senator Bayh. I have not.
>
> Mr. Quie. You have not.

Sex Discrimination Regulations: Hearings Before the Subcomm. On Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess., 183 (1975) (hereinafter *"Sex Discrimination Hearings"*).

The legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq*, upon which Title IX was modeled, also demonstrates that Congress drew a line between direct student assistance programs and those student assistance programs which were operated by the educational institution. Then Deputy Attorney General Nicholas Katzenbach wrote to Representative Emmanuel Celler, then Chairman of the House Judiciary Committee, expressing the following limitation on Federal financial assistance:

> A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status . . . . [T]o the extent that there is financial assistance . . . *the assistance is to an individual and not to a "program or activity" as required by Title VI.*

Hearings on Civil Rights: H.R. 7152, As Amended by Subcomm. No. 5 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess., Ser. 4, pt. IV, 2772, 2773 (1963) (emphasis added).

Similarly, Senator Ribicoff remarked before the Senate that direct payments to individuals were not included as Federal financial assistance under Title VI:

> The individual who receives a direct payment has a right. It has nothing to do with Federal assistance to an individual, but a direct payment. Direct payments are not covered in any way by Title VI.

110 Cong. Rec. 8424 (1964).

This conclusion is confirmed by the exemption from Title VI of an educational benefits act for orphans of veterans which was administered almost identically to the current BEOG

Alternate Disbursement System. *See* War Orphans Educational Assistance Act, Pub. L. 85-857, §1731, 73 Stat. 1192, 1197-98 (Sept. 2, 1958). Explaining the House bill which eventually became Title VI, Senator Humphrey confirmed the exclusion of this student assistance program from the reach of Title VI:

> The title does not provide that individuals receiving funds from government agencies under Federally assisted programs — for example, widows, *children of veterans,* homeowners, farmers, elderly persons living on Social Security benefits — would be denied the funds they receive.

110 Cong. Record 11848 (1964) (emphasis added).

Congress' decision that direct payments to individuals does not equal assistance to the educational institution makes practical as well as logical sense. When assistance is extended by the federal government directly to individual students, the educational institution they ultimately choose to attend has no capacity to discriminate within the student assistance program, as both the choice of beneficiary and the amount of the benefit are determined by the government. If, therefore, the only power that the government seeks to assert is to regulate any program or activity receiving Federal financial assistance, then the government need look no further than its own operations to ensure that the BEOG program is operated free of sex discrimination.

B. *There is a Conflict in the Circuits Regarding the Assurance of Compliance Requirement.*

Similarly erroneous is the government's complementary argument that the Third Circuit properly ordered students' grants terminated because of Grove City's refusal to sign an Assurance of Compliance. Throughout this litigation, Grove City has argued that even if it could be deemed a recipient of Federal financial assistance, it could not properly be forced to execute HEW Form 639A — the Assurance of Compliance

(A124-133), because that document, by its terms and by its reference to existing Title IX regulations (A106-123), applied those regulations to the entire educational institution. While the government now appears to contend otherwise (Brief at 7, n. 7), historically it has been its consistent position that the "receipt" of Federal aid for any purpose subjects an entire educational institution to regulation in all of its programs or activities. This was its position on oral argument before the Third Circuit, as well as its position when Grove City was first commanded to sign the Assurance.

The Department's own fact sheet accompanying the Title IX regulations unequivocably confirms the Assurance's institutional scope:

> [T]he final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs.

HEW Fact Sheet accompanying the final Title IX regulations (1975). Communicating to a House Committee when the Title IX regulations were first promulgated, then HEW Secretary Weinberger reiterated the *Fact Sheet's* interpretation and also confirmed that even if the only assistance being "received" by a college or university is limited to students receiving federal grants or loans, the entirety of the institution would still be subject to all of the Title IX regulations:

> . . . if students attending an institution of higher education are receiving benefits under the various Federal educational assistance programs, then *all* of the institution's activities that are supported by tuition payments of the students can be said to be receiving Federal financial assistance. (emphasis in original)

Sex Discrimination Hearings at 438; Letter of HEW Secretary Weinberger to Hon. James G. O'Hara, Chairman, House Subcommittee on Postsecondary Education, July 2, 1975, reprinted in *Sex Discrimination Hearings*, at 488.

In the face of its own statements and the commonly understood interpretation of the Title IX regulations' scope, the government can hardly argue now that the Assurance can be saved by interpreting it in a program-specific manner. In fact, no court has agreed with the government that the Assurance can be so interpreted. In *Hillsdale*, the Sixth Circuit emphatically rejected the same argument the government makes here, agreeing with Hillsdale that the Assurance and the accompanying Title IX regulations, as written, could not be made program-specific. Slip op. at 24. The Third Circuit endorsed the Department's long-standing institutional interpretation of the Assurance's effect. A direct conflict in the circuit courts thus exists on the Assurance of Compliance issue. While the government now takes the anomalous position that neither circuit is correct, it remains the fact that in virtually identical circumstances, the Third Circuit has ordered termination of students' BEOG grants because of a college's refusal to sign an Assurance of Compliance, while the Sixth Circuit reached the opposite conclusion.[5].

C. *It is Fundamentally Unfair to Subject Colleges in the Third Circuit to a Different Rule of Law From that Prevailing in Other Circuits.*

The BEOG program at issue in this case is one of the most widely-used federal student assistance programs. Virtually every institution of higher education has students receiving BEOG monies. Accordingly, the Third Circuit's institutional approach has obliterated Title IX's program-specific limitation for virtually all of the educational institutions in that circuit. Even though the government now contends that it will not follow the *Grove City* court's reasoning on program-specificity, it cannot simply change its mind regarding the interpretation of Title IX and hope thereby that there will be no effects from this precedent. The fact remains that unless the

[5]The documents in question were the same.

Supreme Court acts now, Grove City and all other colleges and universities in the Third Circuit must live with this decision and conform to its dictates. Already, private litigants have used the *Grove City* precedent to subject other colleges to an institution-wide interpretation of Title IX. *See, e.g., Haffer v. Temple University,* 688 F.2d 14 (3rd Cir. 1982). Two other circuits have expressly rejected that institutional approach to Title IX. *See Hillsdale, supra,* slip op. at 18; *Rice, supra,* 663 F.2d at 338. Despite the govenment's disclaimer, there is a direct conflict in the circuits and this Court should step in and remedy the confusion caused by this concedely erroneous interpretation of Title IX.

CONCLUSION

To avoid such arbitrary injustice, the petition should be granted and the case set for plenary consideration. Alternatively, the Court should grant the petition, summarily vacate the Third Circuit's judgment, and remand for further consideration in light of *North Haven* and the government's revised position.

February 4, 1983

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKATUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can a college which concededly operates no program or activity receiving federal assistance be made subject to Title IX of the Educational Amendments of 1972 solely because some of its students receive federal grants limited to educational purposes?

2. Is the College's entire operation subject to Title IX regulation where the College itself receives no federal financial assistance, but where some of its students participate in direct student assistance programs over which the College can exercise no selection or control?

3. May the Department of Education terminate direct grants to students, without a finding of discrimination in any program which receives federal financial assistance, solely because their College refused to sign an Assurance of Compliance?

4. Does the application of Title IX regulation to the College and its students violate First Amendment rights to academic freedom and association?

PARTIES

The caption of the case in this Court contains the names of all parties.

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In The

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GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Reproduced in Appendix to Petition for Writ of Certiorari ("A")1) is reported at 687 F.2d 684 (3d Cir. 1982). The opinion of the District Court (A 45) is reported at 500 F. Supp. 253 (W.D. Pa. 1980). The decision of the Administrative Law Judge (A 89) is not reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 12, 1982. (A 99). The petition for a writ of certiorari was filed on November 9, 1982, and was granted on February 22, 1983. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following pertinent constitutional provisions, statutes and regulations are reproduced in relevant part in the appendix to the petition:

1. The First Amendment to the United States Constitution. (A 101).
2. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). (A 101).
3. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682. (A 105).
4. The regulations of the Department of Education, 45 C.F.R. Pt. 86.[1] (A 106).

STATEMENT OF THE CASE

Petitioner Grove City College ("Grove City" or "College") is an independent, co-educational liberal arts college located in western Pennsylvania. Since its founding in 1876, the College has refused consistently all forms of government assistance, whether federal, state, or local. The decision to forego participation in government assistance programs is premised on the College's belief in institutional self-sufficiency and autonomy. Committed to deliver a high quality alternative to

[1] When this lawsuit commenced, these regulations were administered by the Department of Health, Education and Welfare (HEW) and were codified at 45 C.F.R. Pt. 86. They were recodified at 34 C.F.R. Pt. 106 in virtually identical form on May 9, 1980, in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802, 30962-63 (1980).

state-supported education at minimal cost,[2] the College is convinced that it could not do so if it were obligated to comply with the expensive and burdensome regulation which invariably follows government funding. This decision is not premised on any desire to discriminate. To the contrary, the College maintains that discrimination on the basis of race or sex is morally repugnant to its principles, a belief it has held voluntarily long before the advent of the nondiscrimination laws. Therefore, even before Title IX was passed, the College claimed no right to discriminate and has consistently maintained a policy of nondiscrimination. (Joint Appendix "JA" 22).[3]

While the College itself accepts no government funding, it will admit students who receive financial aid from various private and governmental organizations. The only role which the College plays in this process is supplying requested information to the scholarship or loan-granting organization — it will certify the student's attendance at the College, indicate the student's full or part-time status, and provide general information about the College's academic program and cost of tuition, room, and board. (JA 22).[4] Grove City does not

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[2]Despite the lack of a significant endowment and notwithstanding the lack of any government funding, the College's current tuition, fees, room and board charges for its 2200 students total only $4270 per academic year, significantly less than other comparable institutions of high academic quality. The College's operating practices are different than other institutions. Making its operations as efficient as possible, it has only 17 administrators and a Board of Trustees very active in the operation of the College.

[3]In addition, the College's admissions and treatment of students are presently regulated by Pennsylvania law, which, *inter alia*, prohibits discrimination on the basis of sex. *See* 17 Pa. Cons. Stat. Ann. § 5001 (Purdon 1981).

[4]This latter information is available in the College's published catalogue.

participate in any government student aid program which provides funds to Grove City for distribution, or which requires any determination by the College of a student's eligibility to receive financial aid. Accordingly, Grove City does not accept students who wish to participate in federal student aid programs where the federal monies are given to the institution to distribute. Under these programs, the institution is required to determine eligible recipients and to select the amounts of grant, loan, or work funds to be furnished the student. *See* Supplemental Educational Opportunity Grant Program, 34 C.F.R. Pt. 676; National Direct Student Loan Program, 34 C.F.R. Pt. 674; College Work Study Program, 34 C.F.R. Pt. 675.

The same desire to avoid any entanglement with federal funding also led Grove City to reject participation in the Basic Educational Opportunity Grant ("BEOG") program[5] when that program was first instituted in 1972. The BEOG program, under its Regular Disbursement System, requires participating colleges to select eligible students, calculate BEOG awards, and disburse the grant proceeds. *See* 34 C.F.R. §§ 690.71-690.85. After Grove City's refusal to participate in the BEOG program, the Department of Health, Education and Welfare ("Department")[6] requested that the College's financial aid office provide forms to its students so that the students could participate in the BEOG program, through its Alternate Disbursement System, by applying directly to the United States Commissioner of Education for the BEOG grants. *See* Letter of Peter K.U. Voigt to Dr. Charles S. MacKenzie, dated January

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[5]20 U.S.C. § 1070a. Grants under this program are now called "Pell Grants."

[6]Unless the context demands greater specificity, both HEW and its successor, the Department of Education, will be referred to as "the Department." In the interests of consistency, the regulations at issue will be cited as 45 C.F.R. The regulations' numbering scheme remains the same, however, whether codified at 34 or 45 C.F.R.

14, 1974. (JA 30). In accordance with this request, and for the convenience of its students, the College stocks Department provided forms. (JA 32-59). In addition to stocking forms, the only role the College has in the BEOG process is to complete Part B of the OE Form 304 (JA 59), which contains only a certification of the student's attendance and publicly available academic and cost information. After the form is completed, it is returned to the student, who submits the form to the Department. The Department then makes an award directly to the student.

In July 1977, the Department requested that the College execute its Form 639 (A 124), an Assurance of Compliance in the manner required by 45 C.F.R. § 86.4.[7] The Assurance, ostensibly a pledge of nondiscrimination, required that the College acknowledge that it was operating federally funded educational programs and was therefore subject to all current and future Department regulations implementing Title IX. 45 C.F.R. Pt. 86. The Department contended that executing the Assurance was necessary because a number of the College's students received grants or loans through the BEOG or Guaranteed Student Loan (GSL)[8] programs. Despite the fact that the grants and loans were paid by the government or private lenders directly to the students, the Department maintained that funds from these sources might be paid eventually to Grove City.[9] This was alleged to make the College a "recipient" of federal financial assistance as that term was

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[7]Now required by 34 C.F.R. § 106.4.

[8]20 U.S.C. § 1071.

[9]The College has neither control over nor knowledge of students' use of BEOG or GSL funds. Under either program, moreover, the funds are not required to be used to pay college charges, but may be used for virtually any purpose. This broad condition, for example, allows the student to spend BEOG funds with private vendors for books, off-campus housing, travel, child care, and miscellaneous personal expenses. See 34 C.F.R.

Footnote continued on next page—

defined in 45 C.F.R. § 86.2(h)(A 108), and, therefore, made all the College's programs subject to all the Department's Title IX regulations.

Grove City told the Department that, as a matter of principle, it did not discriminate and did not intend to do so. The College emphasized, however, that it had consistently refused to accept assistance from the government and that it did not operate any programs or activities which received federal financial assistance. Therefore, Grove City stated that it would not execute the Assurance, especially since the Assurance by its terms imposed institution-wide regulation over all the College's activities.

Faced with Grove City's refusal to sign the Assurance, the Department began proceedings to declare the College, and thereby its students, ineligible to receive GSLs and BEOGs.[10] Following a hearing, an HEW Administrative Law Judge found that the College was not in compliance with the Title IX regulations solely because it refused to execute the Assurance. Concluding that he had no power to change the regulations, the Administrative Law Judge therefore held that students attending the College were ineligible to receive BEOGs or GSLs and ordered termination of their grants and loans. *In re Grove City College,* No. A-22 (September 15, 1978). (A 89). Significantly, the Administrative Law Judge also found that:

—*Footnote continued from preceding page*

§ 690.51 (1981). This wide discretion given to students to spend BEOG funds recently led one court of appeals to conclude that BEOG funds could not be said to be earmarked for educational purposes as that phrase is used in the Food Stamp Act. *See Shaffer v. Block,* Nos. 81-3475/3476/3654 (6th Cir., April 20, 1983). The implication that BEOG funds automatically flow undiverted from the federal treasury to the College must therefore be rejected.

[10] In the administrative proceedings only the College was named as a respondent.

> [T]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief. (A 94).

The Administrative Law Judge's order became final on October 14, 1978. (45 C.F.R. § 81.104). On November 29, 1978, the College and several of its students commenced suit in the United States District Court for the Western District of Pennsylvania, seeking judicial review of the administrative determination pursuant to 20 U.S.C. § 1682 and 5 U.S.C. §§ 701 *et seq.* In an amended opinion on June 26, 1980 (500 F. Supp. 253 (A 45)), the district court granted plaintiffs' motion for summary judgment, holding that the Department could not terminate federal assistance to Grove City students because the College refused to sign the Assurance of Compliance.

Although the district court accepted the Department's argument that BEOGs and GSLs constituted "Federal financial assistance" to the College within the meaning of Title IX, it nonetheless upheld Grove City's position in other respects. First, the court held that the Department could not terminate GSLs because section 902 of Title IX (20 U.S.C. §1682) (A 105) precludes any Title IX enforcement authority with respect to "a contract of insurance or guaranty." 500 F. Supp. at 268-69 (A 75-76). Second, the district court held that the College was not required to sign the Assurance of Compliance because the Assurance required agreement with invalid regulations, as subpart E of the Department's regulations had then been held to be invalid by a number of courts. 500 F. Supp. at 269 (A 76-77). Alternatively, the district court held that termination of assistance to students based solely upon the College's refusal to sign the Assurance of Compliance was unlawful because section 902 of Title IX permitted termination only upon an actual finding of sex discrimination. 500 F. Supp. at 270-72 (A 79-84). Finally, the district court held that termination was impermissible absent a due process hearing for the students affected. 500 F. Supp. at 269-70 (A 78-79).

The Department appealed the failure of the district court to uphold termination of assistance to the College's students.[11] Grove City cross-appealed on the basis that the district court erred in finding it to be a recipient of federal financial assistance within the meaning of Title IX.

In an opinion dated August 12, 1982, the Court of Appeals for the Third Circuit upheld the district court on the recipient issue and reversed it in all other respects. Relying substantially on post-enactment legislative history, the court of appeals held that direct receipt by students of BEOGs rendered the College subject to Title IX as a recipient of federal financial assistance. 687 F.2d at 690-96 (A 10-20). Moreover, in answering the College's argument that upholding Title IX jurisdiction was incompatible with the explicit program-specific limitation contained in Title IX, the court of appeals held that the receipt by students of federal grants rendered the entire College subject to Title IX regulation. In doing so, the circuit court specifically held that "program or activity", as that term is used in Title IX, encompasses the entire educational institution. 687 F.2d at 696-701 (A 23-31). The court of appeals additionally held that the Department may lawfully terminate assistance to students solely because the College refused to sign an Assurance of Compliance and notwithstanding a lack of any proven discrimination. 687 F.2d at 702-04 (A 34-37). Finally, it held that no individual due process hearings were necessary before terminating assistance to students. 687 F.2d at 704 (A 38-39).

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[11] During the appeal the Department withdrew its claim that GSLs are not within the exclusion of section 902 (20 U.S.C. § 1682) for contracts of insurance or guaranty. The Guaranteed Student Loan Program is therefore not at issue in this case. *See* A 9, n.10.

SUMMARY OF ARGUMENT

The issue before this Court is the same as that before Congress in 1972 — to balance two important and constitutionally recognized values: the need to preserve a pluralistic system of higher education, in which some institutions are free to go their own way without governmental intrusion, and the commitment of the government to combat invidious discrimination. In theory these ideals need not necessarily conflict. Institutions accepting government subsidies would knowingly accept some conditions as a price of the aid; other institutions could refuse any governmental aid and set their own policies free from the often heavy hand of government regulation.

In today's world, however, the vast range of government programs providing aid to individuals makes it easy to find traces of governmentally derived benefit wherever those individuals spend their government dollars. If every educational institution that could be said to benefit from federal monies automatically became subject to government regulations, this would obliterate entirely the public/private distinction in higher education. No educational institution's treasury is without some dollars which can be traced to a governmental source. Virtually every educational institution benefits in some way from a whole range of government services. The problem, then, is one of balancing conflicting interests.

In enacting Title IX and its model, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* ("Title VI"), Congress was acutely aware of the need to balance the nondiscrimination imperative with other, equally weighty concerns. When enacting Title IX and Title VI, Congress chose to draw a line between those concerns in two ways: 1) by imposing a program-specific restriction designed to curb excessive executive action and to protect innocent beneficiaries of federal aid; 2) by limiting Title IX and Title VI so that they did not apply to individual recipients of direct federal aid.

Congressional action in establishing the scope of the Title IX must be viewed against the backdrop of its efforts to aid American higher education without sacrificing the institutional diversity and autonomy which are its acknowledged strengths. *See, e.g.,* 20 U.S.C. § 1232(a). When it passed Title IX, Congress balanced against the nondiscrimination principle not only the limitations already set out in Title VI, but a protection of certain existing practices, such as the preservation of single sex institutions, which would have been prohibited under a broad nondiscrimination command. *See* 20 U.S.C. § 1681(a)(5).[12] The result of congressional balancing was the program-specific language of section 901(a), modeled on that of Title VI, which allows regulation only of those educational institutions which conduct a program or activity receiving federal financial assistance.

It is undisputed that Grove City conducts no such program or activity. The College has purposely avoided doing so not because it disagrees with the principle of nondiscrimination, but because it strongly believes in the value of institutional autonomy and desires to continue its long tradition of providing an alternative to state-supported institutions at the lowest possible cost. Its acceptance of students who receive federal grants and then spend them in exchange for educational services — some of which may be provided by the College — does not transform the College into a recipient of federal financial assistance. The regulations which attempt to accomplish this result are inconsistent with the plain language of section 901(a); they expand the concept of receipt contained in section 901(a) to the more expansive and illusive one of benefit. *See* 45 C.F.R. § 86.2(h). Moreover, the regulations, if upheld,

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[12] One of those congressional choices, to legalize a state operated undergraduate school traditionally maintained as a single-sex institution, was recently struck down as violating the Equal Protection Clause. *Mississippi University for Women v. Hogan,* ___ U.S. ___, 102 S. Ct. 3331, 73 L. Ed.2d 1090 (1982).

will have the anomalous effect of forcing colleges such as Grove City to deny admission to beneficiaries of federal funds, many of whom are women and minorities, in order to preserve the colleges' uniqueness and freedom.

The transformation of Grove City into a recipient of federal assistance, solely because its students receive grants, conflicts with the program-specific limitation of Title IX. To conclude that direct student aid is federal financial assistance to the College requires a holding, as the Third Circuit found, that the entire institution is subject to Title IX. But this result is inconsistent with the program-specific limitation Congress enacted in section 901(a) and with this Court's holding in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982) (hereinafter *"North Haven"*). Direct student aid can be logically reconciled with program-specificity only by holding that, within the meaning of Title IX, direct student grants do not constitute "Federal financial assistance" to the educational institution. The only alternative is to accept the Third Circuit's reasoning and give Title IX institutional scope, a conclusion clearly rejected by Congress and this Court in *North Haven*.

Similarly, the legislative history of Titles IX and VI does not support including direct student aid within those statutes' jurisdictional scope. A statement by the Senate sponsor of Title IX, the only contemporaneous legislative history on the issue, demonstrates an intent to exclude direct student aid from Title IX. Furthermore, Congress modeled Title IX's scope on that of Title VI. The legislative history of that title clearly demonstrates that Congress did not consider direct federal grants to individuals to be assistance to a program or activity as used in Title VI. The same consideration was imported into Title IX. Despite the Third Circuit's conclusion, post-enactment events do not provide persuasive evidence of a contrary intent.

Nor does the case law upon which the Third Circuit relied support its interpretation of Title IX. Those cases, which arose in the context of pervasive racial discrimination, have limited applicability where there is no claim of discriminatory action and where the college under scrutiny consistently has denied any right or intent to discriminate.

Having found Grove City to be a recipient of federal financial assistance under Title IX, the Third Circuit concluded that the Department could terminate students' BEOGs solely because Grove City refused to sign the Department's Assurance of Compliance. Should this Court hold that Grove City does not receive federal financial assistance, it will not be necessary to reach this issue. Should the issue be considered, Title IX's program specificity, contrasted with the nature of the obligation imposed by the Assurance of Compliance, requires reversal of the Third Circuit's holding. By its terms, and by consistent administrative interpretation, that assurance subjects the entire educational institution to Title IX regulation, even in programs or activities not receiving federal assistance. The rejection of such an institutional approach in *North Haven* makes the assurance obligation fatally defective.

Similarly defective is the Third Circuit's conclusion upholding termination of students' BEOGs absent any claim or proof of discrimination. Under Title IX's enforcement scheme, termination of funds was considered to be a last resort invoked only after a hearing where discrimination was alleged and proven. Congress was primarily concerned with protecting innocent beneficiaries of federal aid; it did not contemplate termination of funds as a sanction to be used for the violation of a procedural regulation.

Finally, Congress structured Title IX in recognition of the heritage of American higher education, which fostered a large number of independent, non-tax supported institutions. Those institutions have long been centers of innovation, freedom, and experimentation. To preserve this academic diversity, Congress designed its higher education assistance programs to achieve the least intrusive means of achieving its intent to aid education. It hardly contemplated the imposition of uniform standards on all higher education institutions covering subjects such as dormitory regulations, scholarships, campus recruiting, student teacher training, athletics, abortion, illegitimacy and pre-marital sex.[13]

The extent to which Congress may attach such long and intrusive strings to its money is a troubling question. *See, e.g.*, Comment, "The Federal Conditional Spending Power: A Search for Limits," 70 *N.W.U.L. Rev.* 293 (1975). But even assuming Congress has such powers, when Congress has not clearly indicated an intent to use them, but on the contrary has defined a spending program that limits intrusion into higher education, this Court must ensure that eager administrative agencies are not permitted to extend their sphere of regulation beyond the bounds Congress carefully constructed.

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[13] *See* 45 C.F.R. Pt. 86, subparts C & D, (A 112-124).

ARGUMENT

POINT I

The College does not receive federal financial assistance under Title IX.

All parties agree that the only federal funds involved in this case are grants which are paid directly to students by the Department of Education without the knowledge, intervention, or control of Grove City. Nonetheless, because some students may spend their grants at Grove City in the form of tuition, room, or board payments, the Department contends that the College is a recipient of "Federal financial assistance" as that phrase is used in section 901(a) of Title IX (20 U.S.C. § 1681(a)).

A. *The Statutory Language Demonstrates an Intent that Assistance Provided Directly to Students Does Not Constitute Federal Assistance to the Educational Institution.*

Section 901(a) of Title IX states its prohibition of sex discrimination in the following language:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a) (A 101-104). By its terms, section 901(a) protects the participants in federally financed programs and activities from sex discrimination by the educational institution operating such programs or activities. As a condition precedent to becoming a covered recipient of "Federal financial assistance," however, the institution must conduct an "education program or activity" which receives federal assistance.

The Department and the Third Circuit apparently concede that Grove City conducts no programs or activities which are recipients of "Federal financial assistance" in the normally understood sense of the term. Grove City has not applied for assistance under any federal educational program; it has no knowledge of or control over the disbursement of federal funds. The Department contends, however, that it may regulate Grove City by equating "receipt" and "benefit." It argues that because Grove City *benefits* from its students' potential use of federal assistance for tuition and other institutional fees, Grove City receives federal assistance. The Third Circuit also reached this conclusion "since student grants *benefited* the educational institution." 687 F.2d at 695, 700 (emphasis added) (A 19; A 31).[14]

The Department's Title IX regulations make the same equation between "receiving" and "benefiting," stating in their general application section that the regulations apply:

> [T]o every recipient *and* to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance.

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[14]The Department's position has not been a model of consistency throughout this litigation. Under its most recently asserted test of coverage in a case presenting nearly identical issues, it states: "In attacking the regulation as a threshold matter, the College would need to show that it operates no education program or activity that receives federal financial assistance," thus intimating that if a College made such a showing, it would be beyond the reach of Title IX. *See* Supplemental Brief for Federal Respondents at 3-4, *Hillsdale College v. Department of Health, Education and Welfare*, 696 F.2d 418 (6th Cir. 1982), quoted in Brief for the Federal Respondents in response to Petition for Certiorari by Hillsdale College, at n.10. (No. 82-1538). As Grove City has maintained consistently, it has made the required showing by demonstrating it has no capacity to discriminate within the BEOG program, as it neither chooses participating students, determines amounts of awards, or disburses funds. It thus conducts no education program or activity receiving federal financial assistance. Until the Department makes its position on the recipient issue clearer, however, Grove City will continue to assume that the Department supports the concepts advanced in the Title IX regulations and upheld by the Third Circuit below.

45 C.F.R. § 86.11 (emphasis added) (A 111). Similarly, the Department's regulations define "recipient" to include:

> any . . . institution . . . to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . .

45 C.F.R. § 86.2(h) (A 108). *See also* 45 C.F.R. § 86.31(a) (A 114).[15] "Federal financial assistance" is in turn defined to bring within its ambit even the student assistance at issue herein. See 45 C.F.R. § 86.2(g)(1)(ii) (A 107) set out in the footnote below.[16]

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[15] Contrary to this Court's apparent belief in *North Haven* (456 U.S. at 539 n.30), the Department's use of the disjunctive "receives or benefits" does not express a semantic redundancy. Rather, it incorporates what has been termed the "benefit theory," an inherently non-program-specific concept adopted by the district court in *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975). The theory holds that any receipt of federal assistance by any program at an educational institution automatically infects the entire institution because all other programs benefit from the institution's receipt of assistance. *See "Sex Discrimination Regulations: Hearings Before Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,"* 94th Cong., 1st Sess. at 403-406 (1975) (testimony of Janet L. Kuhn) (hereinafter *"Sex Discrimination Hearings"*); *University of Richmond v. Bell*, 543 F. Supp. 321, 323-25, 328-30 (E.D. Va. 1982); *Bennett v. West Texas State University*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981), *rev'd in unpub'd opinion*, No. 81-1398 (5th Cir., Jan. 13, 1983) *pet. for cert. pending*, No. 82-1683.

[16] *"Federal financial assistance"* means any of the following, . . .

* * * *

> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of student admitted to that entity, or extended directly to such students for payment to that entity.

Grove City maintains that such a recharacterization is not consistent with the statutory language chosen by Congress. The coverage of Title IX is by its terms limited to "education program[s] or activit[ies] *receiving* Federal financial assistance." The statutory touchstone is receipt, not receipt or benefit as maintained by the Title IX regulations and the Third Circuit.[17] Had Congress wished to bring colleges like Grove City within the scope of federal control, it could have easily said programs or activities "receiving or benefiting" from federal assistance are covered by Title IX. Similarly, it could have adopted language encompassing all forms of direct and indirect financial assistance. *Cf.* H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963), quoted at pp. 29-30, *infra*. It instead expressly rejected broader coverage proposals and chose more restrictive language. Thus, that language must be given its intended effect. *North Haven*, 456

[17] *Accord*, Comment, "HEW's Regulation under Title IX of the Education Amendments of 1972: Ultra Vires Challenges," 1976 *B.Y.U. L. Rev.* 133 (hereinafter "Ultra Vires Challenges"). While reaching the same conclusion equating benefit and receipt (A 31), the Third Circuit also relied on equating the concept of "indirect" assistance with the student assistance at issue herein. *See* A 15. We maintain that in the sense understood by the Third Circuit, Congress did not adopt language which would have applied Title IX to all forms of direct and indirect assistance. *Cf.* H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963), discussed at pp. 29-30, *infra; Cannon v. University of Chicago*, 441 U.S. 677, 693 n.14 (1979). This is not to say that assistance which is provided through another recipient to an educational program or activity is not within the scope of Title IX coverage. Because federal assistance is often passed through state agencies, this type of indirect assistance leads to Title IX jurisdiction *over the education program or activity* which ultimately receives the assistance. The Title IX regulations recognize this concept, but erroneously broaden it to include monies potentially paid by individual recipients to an educational institution. *See* 45 C.F.R. § 86(h) (A 108). Where an individual is the ultimate beneficiary of the assistance, however, flow-through application of Title IX was not contemplated. *See* 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:36 (1982); Note, "Title VI, Title IX and the Private University: Defining 'Recipient' and 'Program or Part Thereof'," 78 *Mich L. Rev.* 608, 615 (1980).

U.S. at 521; Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof'," 78 *Mich. L. Rev.* 608, 614 (1980) (hereinafter "Title VI, Title IX and the Private University").

B. *Congress and this Court's Rejection of an Institutional Approach to Title IX Requires Reversal of the Decision Below.*

This Court determined in *North Haven* that any agency activity under Title IX must be tested in light of the statute's program-specific command:

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902.

456 U.S. at 538. While paying lip service to *North Haven's* holding on program specificity, 687 F.2d at 697 (A 24), the Third Circuit concluded that *North Haven* "implicitly" adopted an institutional approach to the concept of program. 687 F.2d at 697 (A 25). It then held that "[b]ecause the federal grants made to Grove's students necessarily inure to the benefit of the entire College, the program here must be defined as the entire institution of Grove City College." 687 F.2d at 700 (A 31) (footnote omitted).

As the government concedes, there is "serious doubt" whether the Third Circuit's equation of "program" and educational institution can be reconciled with *North Haven*. *See* Brief for the United States in Opposition to Petition for Certiorari at 8. Yet, the government would construe the Third Circuit's reasoning as *dicta* and avoid any discussion of program-specificity and its effect on what the government describes as the "narrow question" of whether the College is a recipient of federal financial assistance. The government's desire is understandable; it wishes to avoid the inconsistency inherent between the position adopted by the Third Circuit and that adopted by this Court in *North Haven*. However, the

government cannot make this issue disappear simply by labeling it *dicta*. The two concepts are inextricably linked. As the Third Circuit realized, Grove City's recipient status cannot be resolved without consideration of the impact of Title IX's program-specific thrust on the meaning of "receiving Federal financial assistance."

Contrary to the government's position, the Third Circuit correctly perceived that it had to reconcile regulation of a college which conducts no program receiving federal funds with Title IX's program-specific command. Recognizing that federal assistance given directly to the students could not be tied to any specific recipient program at Grove City, the Third Circuit ultimately concluded that the only means of reconciling Title IX coverage over Grove City with program specificity was to hold the entire institution to be a program subject to Title IX. 687 F.2d at 700, 706. (A 31 n. 28; A 43).

While posing the correct question, the Third Circuit reached an erroneous conclusion clearly at odds with *North Haven's* rejection of an institutional approach in favor of a program-specific one. As this Court noted in *North Haven,* Congress failed to adopt proposals which would have applied Title IX institution-wide. 456 U.S. at 537. Both the Nixon administration and Senator Bayh proposed versions of a non-discrimination amendment which would have applied across the board to all programs or activities operated by a recipient of federal assistance. *See* H.R. 5191, 82d Cong., 1st Sess. §1001(b)(1981) (administration proposal); 117 Cong. Rec. 30155-57, 30408 (1971) (Bayh proposal). That Congress knew how to take an institutional approach when it so desired is demonstrated in another section of Title IX. *See* 20 U.S.C. § 1684. Moreover, its precision in defining "educational institution" indicates that it did not equate an education program or activity with the educational institution. 20 U.S.C. §1681(c). *See Rice v. President & Fellows of Harvard College,* 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied,* 456 U.S. 928 (1982);

Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418, 426-427 (6th Cir. 1982) (hereinafter "*Hillsdale*"). Finally, because virtually every educational institution in the United States enrolls students receiving federal grants or loans, to accept the benefit theory and apply Title IX institution-wide would eliminate program-specificity from the statute. *See Hillsdale*, 696 F.2d at 430; *University of Richmond v. Bell*, 543 F. Supp. 321, 329 (E.D. Va. 1982) (hereinafter "*Richmond*").

Because an educational institution cannot be equated with the "program or activity" under Title IX, the question becomes what program or activity can be regulated where federal assistance is paid directly to students and the educational institution they attend has no discretion to choose the recipient, no discretion to choose the amount of the award, and no role in disbursing those funds. The answer clearly cannot be that reached by the Third Circuit. Rather, the concept of a recipient program or activity under Title IX must be co-extensive with the scope of the underlying grant statute. *Cf. Board of Public Instruction v. Finch*, 414 F.2d 1068, 1077-78 (5th Cir. 1969) (same conclusion with respect to Title VI); 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:33 (*Id.*). If chemistry research is assisted by federal grants, for example, then that is the program to which Title IX should be applied. Similarly, when funds are provided to an institution to conduct a student assistance program, the federal government may ensure that those funds are not distributed or assigned in a discriminatory manner.[18]

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[18]This would not preclude termination of assistance to those programs where pervasive discrimination by the institution "infects" a funded program by in fact denying the funded program's intended beneficiaries meaningful participation in the program. *See Board of Public Instruction v. Finch*, 414 F.2d at 1078; *Richmond*, 543 F. Supp. at 329-330; *Rice v. President & Fellows of Harvard College*, 663 F.2d at 339 n.2; *Iron Arrow Honor Society v. Heckler*, 702 F.2d 549, 564 (5th Cir. 1983).

Where the institution does not conduct that student assistance program, no Title IX regulation can apply, as there is no assistance to a program or activity at the educational institution. Instead, the effect of the student's use of the grant at the educational institution he or she chooses to attend should be equated with the permitted use of grant funds with any off-campus vendor. In this context it is not seriously argued that such market transactions equal "Federal financial assistance" to those entities. Similarly, students' use of their grant funds at educational institutions are payments for services rendered rather than assistance. *Richmond,* 543 F. Supp. at 330; 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:36. *Cf. Trageser v. Libbie Rehabilitation Center, Inc.,* 462 F. Supp. 424, 426 (E.D. Va. 1977), *aff'd,* 590 F.2d 87 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979) (similar conclusion under § 504 of Rehabilitation Act). Giving full consideration to the program-specific limitation of Title IX, therefore, no program or activity at Grove City receives federal financial assistance and hence no program or activity is subject to Title IX regulation.[19]

C. *Legislative History Cannot Support the Application of Title IX to the College When Only Direct Student Grants Are Involved.*

In order to justify their expansion of the statute's scope, the Department and the Third Circuit maintain that legislative history supports their equation of receipt and benefit. Upon close review of the contemporaneous sources, however, the limited congressional discussion regarding the meaning of recipient lends no weight to such an interpretation. On the

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[19]This position is not inconsistent with the conclusion of the Sixth Circuit in *Hillsdale,* which found that the "programs" within the meaning of Title IX were the federal loan and grant programs for students. *See* 696 F.2d at 429. *Hillsdale* involved in part campus-based loan and grant programs where the college disbursed federal funds to eligible students. *See* 696 F.2d at 420.

contrary, the evidence strongly supports the conclusion that direct payments to individuals were in no manner meant to be subject to Title IX.

1. *Contemporaneous legislative history of Title IX.*

There is little in the Title IX legislative history which is directly relevant to the meaning of "receiving Federal financial assistance" under Title IX. The Senate version of Title IX was first introduced by Senator Bayh as an amendment to the Higher Education Bill of 1971, but was ruled non-germane. *See* 117 Cong. Rec. 30415 (1971). Senator Bayh later reintroduced his proposal as a floor amendment to the 1972 Higher Education Bill. 118 Cong. Rec. 5803 (1972). Therefore, there are no committee reports discussing its scope. While the 1971 version of the House proposal which became Title IX was reported in committee[20], that report offers no assistance in determining the issue here. Accordingly, the floor debates surrounding the passage of Title IX provide the only authoritative indications of congressional intent regarding the scope of section 901. *See North Haven,* 456 U.S. at 512; *Grove City College,* 687 F.2d at 692 n.15 (A 14); *Hillsdale,* 696 F.2d at 426. In assessing these floor debates, the Court should note that there were differing versions of Title IX proposed. Many of the statements upon which the Third Circuit and the Department rely concerned an earlier version of Title IX which was *not* passed and which was substantially altered and narrowed in scope in the subsequent legislative session. *North Haven,* 456 U.S. at 527; *Hillsdale,* 696 F. 2d at 425-426.[21]

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[20] *See* H.R. Rep. No. 92-554, 92d Cong., 1st. Sess. (1971), [1972] U.S. Code Cong. & Ad. News 2462, 2511-12.

[21] In relying substantially on statements surrounding Senator Bayh's 1971 proposal, the Third Circuit acknowledged differences between the 1971 proposal and Title IX as passed in 1972, but held that its conclusion was not affected. 687 F.2d at 692-93 n.17 (A 15).

A striking example of the difference between Senator Bayh's original nondiscrimination proposal and that ultimately adopted as Title IX is that the original proposal did not apply to private institutions of undergraduate education:

> Sec. 601. No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity . . .

117 Cong. Rec. 30399 (1971). Equally important, the original version did not contain the program-specific limitation included in the Title IX which Congress eventually passed.

The Third Circuit relied on broad statements accompanying this original version as indicating authoritative evidence of congressional intent. 687 F.2d at 692 (A 14). Those statements referred instead to public institutions and graduate schools which were unquestionably receiving substantial direct federal assistance and were not intended to apply to private undergraduate institutions like Grove City.[22] Moreover, had the Third Circuit carefully examined the legislative history of the early versions of Title IX, it would have discovered that the statements expressing the intent of Congress to eradicate sexual discrimination at institutions supported by federal funds are balanced by statements indicating the intent of Congress to avoid infringing on institutional autonomy and preserve institutional diversity. *See* 117 Cong. Rec. 37778 (1971) (Rep. Quie); 117 Cong. Rec. 37785 (1971) (Rep. Green); 117 Cong.

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[22]Student assistance provided by the Higher Education Act of 1971, commensurate with the intent to foster freedom of choice among students, could be used at private or public institutions of undergraduate and graduate education.

Rec. 37790 (1971) (Rep. Erlenborn). Some of the latter concerns were in fact met by amendments which narrowed the scope of Title IX. *See, e.g.*, 117 Cong. Rec. 37790 (1971) (Erlenborn Amendment).

The only contemporaneous legislative history directly discussing the application of Title IX to student assistance occurred in discussions over Senator Bayh's original 1971 proposal. Explaining the scope of the government's termination power under Title IX, Senator Bayh engaged in the following colloquy with Senator Dominick:

> Mr. Dominick. What type of aid the recipient might be getting would be cut off? Let us suppose, for example, that they have guaranteed loans for construction. Let us suppose that they have research grants under the NIH. Let us suppose that they are doing graduate work in some programs authorized by the Defense Department. Just what type of aid are we cutting off here?
>
> Mr. Bayh. We are cutting off all aid that comes through the Department of Health, Education, and Welfare, and as to the specific ones, the Senator has mentioned, I think they would all be included with the exception of research grants made through other departments such as the Department of Defense.
>
> Mr. Dominick. The Senator is talking about every program under HEW?
>
> Mr. Bayh. Let me suggest that I would imagine that any person who was sitting at the head of the Department of Health, Education and Welfare, administering this program, would be reasonable and would use only such leverage as was necessary against the institution.
>
> *It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution,* and the Secretary would be expected to use good judgment as to how much leverage to apply, and where it could best be applied.

117 Cong. Rec. 30408 (1971) (emphasis added). Bayh's answer strongly suggests that he did not consider student aid to be institutional assistance and hence not "Federal financial assistance" received by a program or activity conducted by the public undergraduate institutions or graduate schools covered under his proposal. Bayh's later testimony before the House committee reviewing the Department's Title IX regulations confirms further that in 1971 he believed that direct student assistance did not provide a basis for claiming that an institution is conducting a program or activity receiving federal financial assistance:

> Mr. Quie. I am talking about whether the Department of Health, Education, and Welfare has overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.
>
> Senator Bayh. You know, I just don't know. I would have to look that up if you would like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.
>
> Mr. Quie. But I have heard it claimed that that is one of the reasons why they have jurisdiction.
>
> Senator Bayh. I have not.
>
> Mr. Quie. You have not.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 182 (1975) (hereinafter *"Sex Discrimination Hearings"*). *See also id.* at 411, 481 (Rep. Quie's belief that Bayh rejected the Department's attempt to base Title IX jurisdiction on student *assistance).*[23]

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[23]Senator Bayh later changed his mind. In 1976, he opposed an amendment proposed by Senator McClure to exempt student assistance from the reach of Title IX. *See* 122 Cong. Rec. 28144-45 (1976).

Bayh's belief is further underscored by the distinctions drawn by Congress in the 1971 Higher Education Act between student assistance and institutional assistance. That Act, along with its student assistance provisions, created or continued programs such as community service and continuing education (Title I), library grants (Title II), grants to developing institutions (Title III), construction grants (Title VII), and direct assistance to institutions (Title VIII). This latter program, intended to fund general operational expenses, was a novel and unprecedented form of funding. It was proposed because, contrary to the Department's and Third Circuit's assumption, student assistance programs were perceived as a burden on institutions, not a benefit. Accordingly, the 1971 Higher Education bill would have provided direct assistance to institutions in proportion to the amount of assistance their students received from federal sources. The Senate report explained this proposal for a "Cost of Instruction Allowance" as follows:

> The Committee presumes that, *by making basic grants available* . . ., more students will attend institutions. All evidence available to the Committee indicates that the tuition and fees paid by a student do not cover the cost of instruction for that student, and that the difference between the cost of instruction and the amount of tuition and fees paid by the student must be made up by the institution either from other sources or by raising the amount of tuition and fees paid by the student. To the extent that enrollments increase as a result of Federal activities, *the Federal Government is imposing a burden on the institution* . . . The payments provided for the subpart 5 [the institutional aid] are designed to reimburse the institutions for part of the Federal burden incurred by them.

S. Rep. No. 92-346, 92d Cong., 1st Sess. 43 (1971) (emphasis added).[24]

[24] A general assistance provision, in slightly altered form, was ultimately passed by Congress. At no time has Grove City received any assistance under this program.

The 1972 Act, which included Title IX, maintained the same distinction between institutional assistance and student assistance and confirms that Congress considered — and intended — student assistance programs to be aid to students as distinct from other programs which are aid to institutions. The House report accompanying the Education Amendments of 1972, for example, devoted several pages to a discussion of "Title IV-Student Assistance."[25] The report focused consistently on the student as the sole recipient of the assistance, emphasizing that "the need of each student for federal aid is treated, as much as possible, as an individual matter."[26] Also emphasized was the importance of each student's "desire to attend the college of his choice."[27] Separate sections of the report discussed various programs of assistance to institutions.[28]

The legislative history of Title IX thus cannot support a congressional intent to expand "receiving Federal financial assistance" beyond its natural meaning to the concept of benefit in which the Department and Third Circuit indulged. More importantly, it demonstrates that the Senate sponsor of Title IX gave assurances that Title IX would not permit the very act undertaken by the Department and endorsed by the Third Circuit. Similar kinds of assurances were given during the passage of Title IX's precursor, Title VI, and a study of that title demonstrates that the concept of "program or activity receiving Federal financial assistance" excludes the type of direct individual assistance at issue herein.

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[25]H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 2214, [1972] U.S. Code Cong. & Ad. News 2462.

[26]*Id.*, at 2219, [1972] U.S. Code Cong. & Ad. News 2481.

[27]*Id.*

[28]*See*, e.g., "Title VI-Financial Assistance to Institutions of Higher Education for the Improvement of Undergraduate Education," *Id.*, at 2237, [1972] U.S. Code Cong. & Ad. News 2499.

2. *Title VI legislative history.*

There can be no doubt that Title IX was explicitly modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq. See Cannon v. University of Chicago,* 441 U.S. 677, 696 (1979); 118 Cong. Rec. 18437 (1972) (statement of Senator Bayh); 117 Cong. Rec. 39256 (1971) (statement of Rep. Green). Title VI legislative history does provide guidance in interpreting Title IX. While accepting this premise, several cautions are in order. *See North Haven,* 456 U.S. at 529 ("The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation.").

First, Title IX is recognizably more limited in scope than Title VI. Title IX does not prohibit some forms of discrimination which Title VI would condemn if based upon race (*See* 20 U.S.C. §§ 1681(a)(4) and (a)(5)), and in other areas its prohibitions are far less sweeping.[29] Some broad pronouncements in the Title VI legislative history simply do not apply to Title IX; in enacting Title IX, Congress accommodated a more complicated clash of competing interests.[30]

Second, the BEOG program at issue here was not in existence when Title VI was passed. The Department-administered student assistance programs then in existence were similar to

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[29] *See, e.g.,* the comment of Representative Bingham at 117 Cong. Rec. 39257 (1971):

> We have not said — perish the thought — we have never said that an institution can be all black, or that if it is all white, it does not have to accept blacks. Here we are saying just that, so far as discriminating on the basis of sex is concerned.

[30] The College's admissions, for example, are exempt from the reach of Title IX. *See* 20 U.S.C. § 1681(a)(1). As a matter of policy, however, the College does not discriminate in admissions. (JA 25).

the campus-based programs now sponsored by the Department — federal funds were paid to the educational institution which had the discretion to choose the ultimate student beneficiary. *See* Pub. L. No. 85-864, Title II, § 204, 72 Stat. 1584, codified at 20 U.S.C. § 424 (National Defense Student Loan Program); Pub. L. No. 85-864, Title IV, § 404, 72 Stat. 1591, codified at 20 U.S.C. § 464 (National Defense Education Act Graduate Fellowship Program); *Civil Rights Hearings: Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. II 1542 (1963) (hereinafter "*Civil Rights Hearings*"). This Court must therefore resist the Department's attempt to lump all forms of student assistance into an undifferentiated mass. Grove City does not maintain that all student assistance programs are beyond the reach of Title IX. Rather, it maintains only that Title IX does not reach those programs where the ultimate student beneficiary receives the assistance directly from the Department without the intervention, selection, or control of the educational institution. In those instances, the educational institution is not a recipient of federal financial assistance under Title IX.

The legislative history of Title VI supports this narrower reading of recipient. The language of the originally proposed Title VI was expansive enough to authorize the Department to regulate all forms of financial assistance received by or benefiting an institution:

> Notwithstanding any provision to the contrary any law of the United States providing or authorizing *direct or indirect* financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guarantee, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin.

H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963) (emphasis added). This proposal was revised in committee to eliminate the reference to "indirect" assistance. As one commentator concludes, this suggests a congressional refusal to include indirect funding within the scope of Title VI.[31] It also reflects congressional intent to distinguish between ultimate beneficiaries of federal assistance (those individuals designed to be aided by federal funds) and recipients who were private organizations or governmental entities with the capacity to discriminate against the ultimate beneficiaries. This distinction arose from a concern to avoid punishing innocent beneficiaries through cut-offs of federal funds. Both Congress and the executive branch drew a distinct line between direct federal assistance to individuals and assistance to programs or activities. For example, then Deputy Attorney General Nicholas Katzenbach wrote to Representative Emmanuel Celler, then chairman of the House Judiciary Committee, expressing the following distinction between covered and non-covered federal assistance:

> A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status . . . [T]o the extent that there is financial assistance . . . *the assistance is to an individual and not to a "program or activity" as required by Title VI.*

Hearings on Civil Rights: H.R. 7152, *As Amended by Subcomm. No. 5 Before the House Comm. on the Judiciary,* 88th Cong., 1st Sess., ser. 4, pt. IV, 2773 (1963) (emphasis added).[32]

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[31] Note "Title VI, Title IX and the Private University," 78 *Mich L. Rev.* at 614-15. *Accord,* 3 R. Cappalli, *Fed. Grants & Coop. Agreements* §§ 19:30, 19:36.

[32] Katzenbach also noted that while various other activities of the United States carried out with federal funds could be interpreted as constituting federal assistance, as they resulted in general economic benefit to communities, these activities were not financial assistance to a program or activity within the meaning of Title VI. Katzenbach's careful exclusion underscores the line-drawing difficulties inherent in the Department's and Third Circuit's equation of receiving and benefiting.

Similarly, Senator Ribicoff, former secretary of HEW and one of the sponsors of Title VI, remarked before the Senate that direct payments to individuals did not constitute federal financial assistance under Title VI:

> The individual who receives a direct payment has a right. It has nothing to do with Federal assistance. It is not Federal assistance to an individual, but a direct payment. Direct payments are not covered in any way by Title VI.

110 Cong. Rec. 8424 (1964).

The Department takes the position that the references in the Katzenbach and Ribicoff letters apply only to unrestricted payments, such as social security, and distinguishes those payments from student assistance under the BEOG program, which is said to be earmarked for use in an education program or activity and hence assistance to the education program or activity. This conclusion is erroneous in two respects. First, contextual examination of these statements, and related statements by other Title VI supporters, indicates that these references to direct payments were not limited to social security, but were intended to distinguish any direct federal payment to the ultimate beneficiary, which was outside the scope of Title VI, from federal payments to intermediaries, who had the capacity to discriminate within the programs against intended beneficiaries. Representative Celler states, for example:

> The bill will not punish beneficiaries of Federal aid for wrong committed by others. The bill would not affect an individual homeowner or farmer, for example, who borrows money through a Government agency. It would affect only the distributor of those federal funds if the distributing agency refused to lend to Negroes but did lend to white persons.

110 Cong. Rec. 1519 (1964). Similarly, Senator Case stated:

> This title would not affect Veteran's Administration payments. It would not affect social security payments. It would not affect pensions, or civil service retirement, or railroad retirement, *or any similar programs which involve direct payments by the Federal Government to the beneficiary*. It affects only federally assisted programs where the State or State agency is the intermediary and the chief distributor of the benefits which are involved in such programs.

110 Cong. Rec. 5229-30 (1964) (emphasis added).

Second, the Department's position ignores that student assistance under the BEOG program is virtually unrestricted. *See* 34 C.F.R. § 690.51 (1982). The funds do not have to be spent for tuition or institutional charges and, in fact, represent only a minor fraction of total institutional expenses charged to the student. (JA 60, 63). If the College becomes a recipient of federal financial assistance under Title IX because students may spend their federal dollars there, logic demands that the Department assign similar status to the local bookstore, the landlord, or the neighborhood tavern.[33] It would be ludicrous to claim that these entities are thus transformed into "education programs or activities," demonstrating the absurdity of basing jurisdiction on a nexus so attenuated as that between students' receipt of financial assistance and a private entity's possible benefit therefrom. This in turn underscores the intent of Congress in Title VI to prevent discrimination against beneficiaries, not to restrict use of federal aid by beneficiaries. *See* 110 Cong. Rec. 6544-45 (1964) (Sen. Humphrey's statement that "It is irrelevant, to the purpose of the acts, what the [individual] recipient does with the money he receives."). *See also* Letter from Attorney General Robert Kennedy to Senator John Sherman Cooper (April 29, 1964), *reprinted in* Bureau of

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[33] *Cf. Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881, 884-85 (4th Cir. 1982) (under Rehabilitation Act, 29 U.S.C. § 974, one does not become subject to act merely by enjoying indirectly the benefits of assistance to another).

National Affairs, the *Civil Rights Act of 1964*, at 360 (1964) (Title VI would not authorize imposition of any non-discrimination requirements on individual farmers who were ultimate beneficiaries of federal program); Note, "Title VI, Title IX and the Private University," 78 *Mich. L. Rev.* at 615-616.

This conclusion is confirmed by the exemption from Title VI of an educational benefits act for orphans of veterans which was administered almost identically to the current BEOG Alternate Disbursement System. *See* War Orphans' Educational Assistance Act, Pub. L. No. 85-857, § 1731, 73 Stat. 1192, 1197-98 (Sept. 2, 1958). Explaining the House bill which eventually became Title VI, Senator Humphrey confirmed the exclusion of this direct student assistance program from the reach of Title VI:

> The title does not provide that individuals receiving funds from government agencies under Federally assisted programs — for example, widows, *children of veterans,* homeowners, farmers, elderly persons living on Social Security benefits — would be denied the funds they receive.

110 Cong. Rec. 11848 (1964) (emphasis added).

3. *Post-enactment legislative history.*

In endorsing the theory that an institution's benefit from its students' receipt of BEOGs was enough to justify Title IX coverage, the Third Circuit relied substantially on post-enactment legislative events. 687 F.2d at 693-95(A 16-20). It held that the congressional failure to pass resolutions disapproving the Title IX regulations, the congressional failure to pass amendments to Title IX exempting all student assistance from its reach, and later statements by several senators provided "a substantial indication" that Congress intended to include BEOGs within the coverage of section 901(a). 687 F.2d at 695(A 20). The language, structure, and contemporaneous

legislative history contradicts such an indication and this Court should reject the Third Circuit's attempt to bootstrap an erroneous conclusion by means of either the political viscissitudes of a subsequent Congress or the retroactive wisdom of individual members gained four years after enactment.

While recognizing that post-enactment events can provide "additional evidence" or "lend weight" in instances where they are not inconsistent with legislative language or contemporary understanding (*See North Haven*, 456 U.S. at 530, 534), this Court has consistently recognized that post-enactment events are unreliable guides to congressional intent. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979); *Bryant v. Yelleh*, 447 U.S. 352, 376 (1980). With respect to the types of disapproval resolutions in issue, Congress has reached the same conclusion. *See* 20 U.S.C. § 1232(d)(1)(1976). In light of the separation of powers doctrine, refusal to accord controlling weight to post-enactment legislative history is a sound policy of judicial restraint. Otherwise, the legislative process may be chilled by an intervening judicial holding that legislative intent may be found in the defeat of the proposal.

D. *Cases Upon Which the Department and Third Circuit Relied Do Not Support their Expansion of the Statute.*

The Department and the Third Circuit placed much reliance on several cases under Title VI and the Constitution in reaching their conclusion that the possible benefits educational institutions derive from direct student assistance render them subject to Title IX as recipients of federal financial assistance. 687 F.2d at 695-96 (A 21-22). For several reasons, these cases do not provide a persuasive analogy for application of Title IX. The race discrimination cases decided under Title VI and the Fourteenth Amendment presented entirely different problems

than the present case. Both *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975) (hereinafter *"Bob Jones I"*), and the *Norwood*[34] line of cases had constitutional underpinnings which, because of the existence of pervasive discrimination, required a careful analysis of whether federal funds, however indirectly, flowed to the discriminating entity. Here, there is no allegation that Grove City has discriminated on the basis of sex in any manner. The Department's and Third Circuit's position, therefore, must rest on the statutory language of Title IX. *Hillsdale*, 696 F.2d at 429.

Moreover, because of the all-pervasive discriminatory practices at issue in *Bob Jones I*, analysis based upon program-specific statutory language was unnecessary. See *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1387 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983), where the court commented:

> Racial discrimination respecting acceptance or admission into educational institutions permeates all programs and activities within those institutions. Once racially discriminatory admission policies have been found to exist, the taint of racial discrimination affects all programs and activities within the particular institution. Therefore, the courts which have decided suits brought under Title VI did not have to carefully focus upon the institutional/programmatic conflict which is now squarely before this court.

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[34] *Norwood v. Harrison*, 413 U.S. 455 (1973).

Accord, Hillsdale, 696 F.2d at 429; *Richmond*, 543 F. Supp. at 328.[35]

In any event, the concept of institution-wide benefit applied by the *Bob Jones I* court is not consistent with congressional limitation of recipient and is completely irreconcilable with the program-specific limitation on the Department's regulatory and enforcement power under Title IX. While the *Bob Jones I* court assumed that "all that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the approved school," 396 F. Supp. at 603 n.22, it reached this assumption without any examination of the relevant legislative history. Analysis of that legislative history demonstrates a rejection of institution-wide coverage as well as a rejection of the equation of receipt and benefit assumed by the *Bob Jones I* court.[36] *See* pp. 22-33, *supra*.

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[35]Similarly, *Bob Jones University v. United States*, 51 U.S.L.W. 4593 (No. 81-3, May 24, 1983), is not helpful to the resolution of this case. There this Court upheld the ruling of the Internal Revenue Service that avowedly racist schools were not entitled to federal tax exemptions. Grove City fully endorses that result, but maintains that a conclusion reached in light of those institutions' undeniable discriminatory practices and the clear public policy against racial discrimination in education has no applicability to the issues presented here.

[36]Courts and commentators, while recognizing that *Bob Jones I* may have reached the correct *result* in light of the institution's invidious discriminatory practices, have criticized its interpretation of the statutory language and particularly the case's application to Title IX. *See* Note, "Title VI, Title IX and the Private University," 78 *Mich. L. Rev.* at 613-14; *Richmond*, 543 F. Supp. at 328, 332 n.14.

POINT II

Even if Grove City may be termed a recipient of federal financial assistance, the Third Circuit improperly ordered termination of the student grants.

Having found Grove City to be a recipient under Title IX, the Third Circuit went on to hold that students' BEOG funds could be terminated solely because Grove City refused to sign an Assurance of Compliance (HEW Form 639 (A 124)) in the form prescribed by the Department's regulations, 45 C.F.R. § 86.4 (A 110). *See* 687 F.2d at 702-05 (A 35-37). The Department argues that resolution of this "narrow question" is all that is necessary for the disposition of the case and that the Third Circuit's conclusion holding the "program or activity" at Grove City to be the entire institution is *dicta*. *See* Brief for the United States in Opposition to Petition for Certiorari at 5-8. The College has argued above that the Department's position begs the question presented — how to reconcile regulation of a private college which itself neither receives nor distributes federal aid, but whose students receive direct federal grants, with a statute which applies only to "an education program or activity receiving Federal financial assistance" — and that application of Title IX to Grove City is not possible given the language and intent of Congress.[37] Nonetheless, should this Court find that Grove City does receive federal financial assistance, it will be necessary for it to confront further questions relating both to the viability of the Department's

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[37] Only Congress can rewrite Title IX to bring direct student grants within the coverage of the statute. Nonetheless, it would be possible to create statutory language which allows the Department to disallow students' use of their federal grants at institutions which practice discriminatory policies, such as admissions, that cut across the spectrum of all their programs or activities. *Cf. Rice v. President & Fellows of Harvard College*, 663 F.2d at 339 n.2. This would allow Congress to prohibit avowed and invidious discriminatory practices yet preserve Title IX's programmatic thrust in other instances.

Assurance of Compliance requirement in light of Title IX's program-specificity and the Department's power to terminate student assistance without any finding of sex discrimination, solely because Grove City refused to sign that Assurance.

A. *The Department's Assurance Requirement Violates the Program-Specific Limitation of Title IX.*

Throughout this litigation, Grove City has advanced the argument that even if it could be deemed a recipient of federal financial assistance, it could not properly be forced to execute HEW Form 639 — the Assurance of Compliance (A 124-133), because that document, by its terms and by its reference to existing Title IX regulations (A 106-123), applied those regulations to the entire educational institution. While the Department now appears to contend otherwise (Brief of United States in Opposition to Petition for Certiorari at 7, n.7), historically it has been its consistent position that the "receipt" of federal aid for any purpose subjects an educational institution to regulation in all of its programs or activities.[38]

The Third Circuit majority never discussed the scope of the assurance requirement, presumably because it agreed that Grove City was obligated to accept institution-wide Title IX coverage. Judge Becker's concurring opinion, however, states his belief (687 F.2d at 706 (A 41-43)), now apparently adopted by the Department, that the Assurance could be made consistent with Title IX's program-specific requirement. Such an effort would require a rewriting of the Assurance, the Title IX

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[38]The Department has maintained that this position may be reconciled with a program-specific interpretation of the statute. *See Sex Discrimination Hearings* at 485 (testimony of Secretary Weinberger). Its path to this reconciliation requires an extremely strained interpretation of *Board of Public Instruction v. Finch*, however. "Ultra Vires Challenges," 1976 *B.Y.U. L. Rev.* at 172-76; *Sex Discrimination Hearings* at 404-406 (testimony of Janet Kuhn).

regulations, and Title IX history over the past ten years.[39] As the Sixth Circuit concluded in *Hillsdale:*

> The difficulty with Judge Becker's view is that it is HEW's very position that the entire college is a program and that by executing the Assurance, the college agrees to comply with regulations as they apply to the entire institution. Simply stated, it appears to us that it would be anomalous to hold that the college may be required to execute the Assurance because it is so limited by its terms when HEW construes the Assurance and its regulations to apply to the college as an institution, a position that is, in our view, not supportable under Title IX.

696 F.2d at 430. The *Hillsdale* court's conclusion is confirmed by the position taken by the Department on oral argument before the Third Circuit, as well as its position when Grove City was first commanded to sign the Assurance.

The Department's own fact sheet accompanying the Title IX regulations unequivocably states:

> [T]he final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs.

HEW Fact Sheet accompanying the Final Title IX Regulations (1975). Communicating to a House Committee when the Title IX regulations were first promulgated, then HEW Secretary Weinberger restated the *Fact Sheet's* interpretation and also confirmed that even if the only assistance being "received" by a college or university was limited to students receiving federal grants or loans, the whole institution would still be regarded as being subject to all of the Title IX regulations:

> . . . if students attending an institution of higher education are receiving benefits under the various Federal educational assistance programs, then *all* of the institu-

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[39]Cf. G. Orwell *1984* at 36-38 (New Am. Lib. ed 1949).

> tion's activities that are supported by tuition payments of the students can be said to be receiving Federal financial assistance. (emphasis in original).

Sex Discrimination Hearings at 438; Letter from HEW Secretary Weinberger to Hon. James G. O'Hara, Chairman, House Subcommittee on Postsecondary Education (July 2, 1975), reprinted in *Sex Discrimination Hearings* at 488.[40]

Therefore, despite the Department's reliance on its *current* interpretation of the Assurance of Compliance requirement, the truth of the matter is that Grove City students are having their federal grants terminated because Grove City refused to execute a specific document, HEW Form 639 (A 124), and it is the application of that document which is at issue here. Form 639 provides:

> The Applicant hereby agrees that it will:
>
> 1. Comply [with] all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX, 45 C.F.R. Part 86 . . .

(A 126-27). As explained in an accompanying attachment, the Assurance:

> . . . constitutes a legally enforceable agreement to comply with Title IX and *all* of the requirements of Part 86.

(A 131) (emphasis added).

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[40]See also *id.* at 485, where then Secretary Weinberger, in response to a question, states, "In other words, if the Federal Funds go to an institution which has educational programs, then the institution is covered throughout its activities;" *id.*, at 171 (statement of Senator Bayh); *id.* at 387 (statement of Dr. Bernice Sandler). Courts and commentators have similarly recognized that the Department's "benefit" or "institutional" approach is reflected in the regulations. *See Bennett v. West Texas State University*, 525 F. Supp. at 79 (N.D. Tex. 1981); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1033 n.18 (E.D. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Note, "Title IX Sex Discrimination Regulations: Impact on Private Education," 64 *Ky. L. J.* 656, 689-94 (1977); "Ultra Vires Challenges," 1976 *B.Y.U. L. Rev.* at 148-50.

The Department's assertion that the Assurance requires only that Grove City pledge that it will not discriminate is simply wrong. Execution of the Assurance will require Grove City to: (1) concede the propriety of Title IX coverage over all its programs and activities which "benefit" from federal financial assistance and thereby submit itself to the institution-wide applicability of the regulations; (2) undertake, at its peril, to decide with which regulations it must comply and with which it need not because they have not been lawfully adopted;[41] and (3) undertake an independent contractual duty of compliance with the Department's regulations. A 131; *Lau v. Nichols*, 414 U.S. 563, 570 (1974); *United States v. El Camino Community College District*, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *United States v. Phoenix High School Dist.*, 681 F.2d 1235, 1237 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1169, 75 L.Ed.2d 422 (1983); *Richmond*, 543 F. Supp. at 325. The College must take these actions in the absence of any showing that the failure to execute the Assurance will impede, in any way whatsoever, the Department's enforcement of Title IX. Contrary to the Third Circuit's apparent belief (A 36), neither the Assurance of Compliance nor the Title IX regulations themselves require any information to be disclosed.[42]

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[41] Such uncertainty would violate the duty imposed on the executive branch to state in unambiguous terms the conditions it seeks to impose on the grant of federal funds. *Cf. Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *United States v. Phoenix Union High School Dist.*, 681 F.2d 1235, 1237 n. 2 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1169, 75 L.Ed.2d 422 (1983) (regulations' ambiguity may raise questions of constitutional infirmity under *Pennhurst*).

[42] Accepting the Department's apparent position that all that it wishes is to ensure that there is no discrimination in programs or activities receiving federal financial assistance, all the information concerning the participation of the College's students in the BEOG program is provided in the forms each student must submit each year as a condition of receipt of the federal grant. *See* JA 59.

In the face of its own statements and the commonly understood interpretation of the Title IX regulations' scope, the Department can hardly argue now that the Assurance can be saved by interpreting it in a program-specific manner. In fact, the Department, in the contract it seeks to impose on the College, requires fealty to obligations which are far broader than the statutory mandate. This fact alone compels reversal of the decision of the Third Circuit.

B. *Student Assistance Funds Cannot Be Terminated in the Absence of Proven Discrimination Solely Because the College Refused to Sign the Assurance of Compliance.*

Despite his finding that "[t]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX" (A 94), the HEW Administrative Law Judge ordered a cut-off of federal assistance to Grove City students (A 96-97). The district court held this action to be inconsistent with Title IX's purpose. Seeking to avoid the "absurd result" whereby innocent students would be punished by loss of BEOG assistance in the absence of any concomitant benefit (the eradication of sex discrimination), the district court enjoined the Department from terminating assistance to students in the absence of a specific finding of sex discrimination. 500 F. Supp. at 261, 270-72 (A 60, 79-84). The Third Circuit reversed, holding that Title IX allows the Department to terminate assistance solely because Grove City refused to sign the Assurance, even in the absence of any allegation or finding of sex discrimination. 687 F.2d at 703 (A 37).

The Third Circuit based its conclusion on the language of section 902, which authorizes the promulgation of regulations "consistent with achievement of the objectives of the statute authorizing the financial assistance . . ." (A 36-37). Assuming that the Assurance requirement was consistent with this authorization, the Third Circuit upheld the Department's termination of the BEOGs on the basis of section 902's language permitting termination upon a failure to comply with "any requirement adopted pursuant to this section." (A 36). The court reasoned:

> We are satisfied that Title IX authorizes the promulgation of the assurance regulation and that the Department can therefore properly condition its grant or denial of funds upon adequate representations that the recipient does not discriminate.

687 F.2d at 703 (A 37).

Such a result stands Title IX on its nead. Congress simply did not contemplate the termination of assistance upon a failure to comply with some formalistic prerequisite. The safeguards incorporated in section 902 were intended to ensure that federal funds would not be denied absent a finding of discrimination. Title IX, as well as its precursor, Title VI, were designed to protect beneficiaries of federal assistance both from the effects of discrimination and from overzealous terminations of their government grants. The statutes are remedial in intent, not punitive. Yet, despite the availability of other enforcement mechanisms,[43] and despite the fact that there is not even an allegation of discrimination on Grove City's part, the Department has chosen to use termination of assistance to individual students as a club to force its interpretation of Title IX's scope on Grove City. By this act, it has turned a remedy of last resort into a front-line choice of bureaucratic coercion. Such an action is far from the intent of Congress, which envisioned use of the termination power only after all attempts at voluntary elimination of discriminatory practices occurred and only after a hearing proved that discrimination was in fact taking place.

This conclusion can be inferred from congressional adoption of the pinpoint termination provision of section 902 which provides that the drastic remedy of funds termination be limited only to the program where discrimination occurs.[44] This

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[43]The "any other means authorized by law" spelled out in section 902. *See also Sex Discrimination Hearings* at 483 (statement of then HEW Counsel Rhinelander.)

[44]The pinpoint termination provision limits funds termination to "the particular program or part thereof" where discrimination is found. *See* 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:52 (history and explanation of pinpoint provision).

intent can also be extracted from the congressional consensus that a finding of discrimination was necessary before funds termination could take place. While those statements are contained in the legislative history of Title VI, section 602 (42 U.S.C. § 2000d-1), that title's enforcement provision was copied verbatim into section 902 of Title IX.[45] Title IX's authors assumed that the enforcement policies would be the same under both statutes. *See, e.g.*, 118 Cong. Rec. 18437 (1972) (statement of Senator Bayh).

Those expressions of congressional intent belie the Third Circuit's interpretation of section 902's language as authorizing termination of assistance for the violation of any validly promulgated regulation. Rather, they indicate that the termination power pertains only to a violation of a substantive nondiscrimination requirement, not a procedural regulation. The Third Circuit's contrary interpretation ignores both the enforcement alternatives contemplated by section 902 and the careful limitations placed by Congress on the termination power.

Senator Humphrey, Senate sponsor of Title VI, for example, explained that any funds cut-off could be made only after an express finding that the particular recipient had failed to comply with a nondiscrimination requirement. 110 Cong. Rec. 7063 (1964). Similarly, one of the designated Senate captains of Title VI, Senator Pastore, confirmed that the "requirements" adopted by an agency to which section 602 refers must be nondiscrimination requirements. 110 Cong. Rec. 7063 (1964). He explained further that before funds could be cut off, "[t]he agency must first adopt a general non-discrimination rule, regulation, or order." *Id.* Then, "[i]f the agency determines that a refusal or termination of funds is appropriate, it must make an express finding that the particular person from whom funds are to be cut off is still discriminating." *Id.*

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[45] *Compare* 42 U.S.C. § 2000d-1 *with* 20 U.S.C. § 1682 (A 105).

Congress similarly intended that section 602's public hearing requirement protect those recipients not guilty of discrimination. Over and over during the Senate debates, Title VI proponents outlined the importance of the hearing requirement as a procedural safeguard. As enacted, section 602 provides for the termination of assistance "to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply . . ." with an agency's nondiscrimination requirement. 42 U.S.C. § 2000d-1. Section 902 of Title IX is identical. 20 U.S.C. § 1682(A 105). That hearing process is meaningful only when a factual question exists as to a recipient's discriminatory practices. Otherwise, as in the present case, the hearing process becomes a meaningless formality. Thus, Congress understood and intended the termination provision to authorize the cut-off of funds only after an express finding of discrimination had been made. Senator Humphrey, for example, stated:

> [T]he authority to cut off funds is hedged about with a number of procedural restrictions. Before funds would be cut off, the following would have to occur: First, the agency must adopt a nondiscrimination requirement, by rule, regulation, or order of general applicability; . . . sixth, if [the agency] determines that a refusal or termination of funds is appropriate, the agency must make an express finding that the particular person from whom funds are to be cut off has failed to comply with its nondiscrimination requirement.

110 Cong. Rec. 6544 (1964). *See also* 110 Cong. Rec. 7066 (1964) (Sen. Ribicoff); 110 Cong. Rec. 8344 (1964) (Sen. Proxmire); 110 Cong. Rec. 9111 (1964) (Sen. Keating).

The same understanding existed in the House. During hearings on early versions of Title VI, for example, a colloquy between HEW Secretary Celebreeze and Representative Rodino emphasized the procedural safeguards which would be established by the Bill. After Celebreeze's statement that an investigation and finding of facts would take place before

termination, Representative Rodino asked in addition whether a finding of discrimination would be required. Secretary Celebreeze replied affirmatively. *Civil Rights Hearings* at 182. *See also* 110 Cong. Rec. 15894 (1964) (Rep. Celler). Thus, there was no doubt in the collective mind of Congress that Title VI afforded the recipients of federal financial assistance a continuing right to receive that assistance until an express finding of discrimination was made. There can be no doubt that Title IX does the same.

A conclusion that termination would only occur after a finding of discrimination also follows from the concerns expressed by Congress about avoiding use of the termination power as a punitive sanction, and, particularly, avoiding punishing innocent beneficiaries. As Senator Humphrey stated:

> Termination of assistance . . . is not the objective of the title — I underscore this point — It is a last resort, to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds. This fact deserves the greatest possible emphasis: Cut-off of Federal funds is seen as a last resort, when all voluntary means have failed.

110 Cong. Rec. 6544 (1964).

Implicit in this remark, and in the multitude of other comments by Senator Humphrey and his colleagues, is the understanding that the termination sanction under Title VI would be appropriate and necessary only where discrimination exists. Logically, if no discrimination is occurring, no termination of funds can take place. The whole framework of section 602 presupposes the existence of discrimination before the invocation of the termination sanction. Senator Ribicoff, in responding to those "under the impression that the provision would result in cutting off of Federal programs as a punishment, affecting the innocent as well as the guilty," stated:

> Title VI does not affect those who do not discriminate. We are trying to establish a record on the floor of the Senate to spell out what Title VI does and what it does not do.

110 Cong. Rec. 7068 (1964).

Unfortunately, in its single-minded pursuit of the theory that Grove City is a recipient of federal assistance, the Department and the Third Circuit have ignored the foregoing record, thus disregarding also the plight of Grove City students, the real losers should an aid cut-off occur. The district court correctly rejected the Department's contention "that innocent students should be punished for no good or legally sufficient reason relating to the extinguishment of on-going sex-discrimination, . . . merely because their College refused to fill out a regulatory form . . ." 500 F. Supp. at 272 (A 84). Grove City has not discriminated, yet students who attend Grove City will be prevented from participation in aid programs designed especially to support their educational aspirations. To avoid such an arbitrary injustice, the Department's termination power must be restricted to cases of actual discrimination.

POINT III

Application of the Title IX regulations to Grove City violates the College's and its students' First Amendment rights to academic freedom and association.

The genius of American higher education derives from the great variety of philosophies, operating practices, and ideals offered by the nation's educational institutions, ranging from the largest state university system to the smallest private academy. Much as a multiplicity of voices promotes a free press, this diversity of educational offerings preserves academic freedom and serves as an important source of democratic values and ideas. The Department's disregard of the limitations upon its regulatory authority has led to regulations which, by attempting to control every facet of Grove City's academic community, threaten to destroy one part of this valued diversity. Despite the attenuated nexus between Department-administered funds and the College, the Department asserts control over the College's day-to-day operations, threatening to destroy its autonomy and eliminate its unique characteristics, in a misguided attempt to place it in the same mold as its tax-supported sisters.[46]

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[46]Over thirty years ago, the Commission on Financing Higher Education predicted the trend exemplified by the Department's action:

Footnote continued on next page—

Such an attempt violates the core principles for which Grove City stands and disregards the sacrifices it has made for decades to avoid federal control. Since its founding, Grove City College has professed deeply held beliefs regarding the proper role of the individual, government and private education. For over a century, the College has steadfastly maintained a strict independence from governmental funding, holding that the practice of institutional self-sufficiency and autonomy is essential to its educational philosophy. (JA 21-22). A similar philosophy guides the political and economic teaching of the College's faculty. Moreover, the College has continued its strong espousal of religious principles. Although it is not controlled or operated by any church, it retains its Christian conscience. In an atmosphere of toleration for all creeds and disregard of all irrelevant characteristics such as race, sex, national origin, or handicap, Grove City inculcates in its students the importance of economic freedom, religious liberty, and the individual responsibility to conform those values to standards of Christian ethics. Similarly, Grove City has undertaken itself to do what is morally right without government compulsion.

It is significant to note that Grove City and its students are asserting a *protected* right; they claim no right to engage in discrimination and, indeed, such a claim would be repugnant to the moral principles which guide Grove City. The Department's

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—Footnote continued from preceding page

> We thrive on our diversities, on the competition of our American life, on our varying institutions and businesses, on our differing interests and loyalties, on the very vitality of our independence, free in its broader aspects from dominance and control. Such independence will be threatened if higher education is subjected to further influence from the federal government . . . Diversity disappears as control emerges. Under control our hundreds of universities and colleges would follow the order of one central institution. And the freedom of higher education would be lost . . .
>
> Direct federal control would in the end produce uniformity, mediocrity, and compliance. Verve, initiative, and originality would disappear . . . This must not be. There must be no such control.

Nature and Needs of Higher Education: The Report of the Commission on Financing Higher Education, (Col. Univ. Press. 1952), quoted in ***Sex Discrimination Hearings*** 237 (statement of Dallin Oakes, President of Brigham Young University).

and Third Circuit's reflexive invocation of this Court's cases denying any First Amendment right to discriminate must therefore be rejected as inapplicable to the issues presented by this case.

Rather, the issue is one of government regulation and academic freedom. This Court has long recognized the importance of preserving the autonomy of an academic community from overzealous state intervention.[47] Those doctrinal threads support striking down the intrusion into Grove City's institutional autonomy contemplated by the Department's regulations and endorsed by the Third Circuit. *See* brief, *amicus curiae,* of Wabash College. In any event, there can be no doubt that a serious constitutional question is raised by the Department's action, an issue that requires balancing of two important principles.

When presented with a First Amendment issue which would give rise to "serious constitutional questions," this Court has cautioned that the federal courts must first identify "the affirmative intention of Congress clearly expressed" before concluding that the statute in question vests broad-based regulatory jurisdiction within a government agency. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-501 (1979). *Cf. Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The statutory language, structure, and legislative history urged by Petitioners belie any clearly expressed congressional intention to include situations such as the College's within the scope of Title IX.

The Department's action, as endorsed by the Third Circuit, creates a senseless predicament for Grove City: compromise its autonomy or deny admission to students receiving any kind of

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[47] *See Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Numerous commentators have suggested a constitutional basis for protecting the institution's version of an ideal academic community from intrusive Federal legislation. *See, e.g.,* O'Neil, "God and Government at Yale: The Limits of Federal Regulation of Higher Education," 44 *Cinc. L. Rev.* 525 (1975); Oakes, "A Private University Looks at Government Regulation," 4 *J.C. & U.L.* 1 (1976); Note, "Academic Freedom and Federal Regulation of University Hiring," 92 *Harv. L. Rev.* 879 (1979).

federal financial support. Such a Hobson's choice was never contemplated by Congress, which deliberately crafted Title IX to balance the nondiscrimination principle with the ideals of institutional diversity and student free choice. This Court should restore that balance.

CONCLUSION

Title IX was never intended to authorize regulation of a college solely because some of its students receive federal grants. Similarly, it was never intended to authorize termination of students' grants solely because this College refused to file a regulatory form. Based on the foregoing, the decision of the United States Court of Appeals for the Third Circuit should be vacated and the case remanded to the United States District Court for the Western District of Pennsylvania for entry of an order declaring that Grove City is not a recipient of federal financial assistance under Title IX and enjoining the Department from terminating assistance to students attending Grove City.

Dated: June 7, 1983

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OCTOBER TERM, 1983

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Grove City College operates an "education program or activity receiving Federal financial assistance" under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 (a)), and is thus subject to a Department of Education regulation requiring it to execute an "Assurance of Compliance" with Title IX.

2. Whether the Department of Education may terminate federal financial assistance to Grove City College under the Basic Educational Opportunity Grant statute, 20 U.S.C. (Supp. V) 1070a, if the College refuses to execute an Assurance of Compliance.

3. Whether the application of Title IX regulations to Grove City College infringes the First Amendment rights of the College or its students.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-792

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 687 F.2d 684. The opinion of the district court (Pet. App. A45-A88) is reported at 500 F. Supp. 253. The decision of the Administrative Law Judge (Pet. App. A89-A98) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A99-A100) was entered on August 12, 1982. The petition for a writ of certiorari was filed on November 9, 1982, and was granted on February 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution is set forth at Pet. App. A101.

2. Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, are set forth at Pet. App. A101-A105.

3. Relevant portions of the Basic Educational Opportunity Grant statute, 20 U.S.C. (Supp. V) 1070a, are set forth at App. A, *infra*, 1a-4a.

4. Relevant Title IX regulations of the Department of Education—34 C.F.R. 106.2, 106.4, and 106.11—are set forth at Pet. App. A106-A108, A110-A111.[1]

5. Relevant Basic Educational Opportunity Grant regulations—34 C.F.R. 690.1, 690.3-690.7, 690.53, 690.61-690.64, 690.71-690.85, and 690.91-690.96—are set forth at App. B, *infra*, 5a-24a.

STATEMENT

Petitioners, Grove City College ("Grove City" or "the College") and four of its students who received Basic Educational Opportunity Grants ("BEOGs") and Guaranteed Student Loans ("GSLs"), brought this suit in November 1978 for declaratory and injunctive relief prohibiting the Department of Health, Education, and Welfare ("HEW")[2] from terminating federal financial assistance received by the College under the BEOG and GSL statutes. HEW had threatened termination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, because the College refused to comply with

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[1] The Title IX regulations which appear in the petitioners' appendix are those promulgated by the Department of Health, Education and Welfare in 1975. They were recodified, without substantive change, at 34 C.F.R. Part 106 on May 9, 1980 in connection with the establishment of the Department of Education. Despite occasional anachronisms, we will refer throughout to the currently effective regulations and statutory provisions.

[2] HEW's functions under Title IX with respect to BEOGs and GSLs were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. We will refer to both HEW and the Department of Education as "the Department."

HEW regulations by executing an Assurance of Compliance with Title IX.[3]

1. Basic Educational Opportunity Grants (20 U.S.C. (Supp. V) 1070a) were established by the Education Amendments of 1972 (Pub. L. No. 92-318, 86 Stat. 248), which amended the Higher Education Act of 1965[4] to provide grants enabling students to pursue an undergraduate degree. The BEOG program is "viewed as the foundation upon which all other Federal student assistance programs are based." S. Conf. Rep. No. 92-798, 92d Cong., 2d Sess. 167 (1972). A maximum amount is established for the grant.[5] The amount that the student or his family can reasonably be expected to contribute is subtracted from the maximum grant. 20 U.S.C. (Supp. V) 1070a(a)(2)(A)(i). In addition, the grant cannot exceed a certain fraction of the cost of attendance at the student's institution. 20 U.S.C. (Supp. V) 1070a(a)(2)(B)(i). "[C]ost of attendance" is defined to include tuition and fees, room and board, and an allowance for books, supplies, and miscellaneous expenses. See 20 U.S.C. (Supp. V) 1089(d).[6]

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[3] The Assurance of Compliance (HEW Form 639) that Grove City was asked to execute is reproduced at Pet. App. A124-A129. The current form, adopted by the Department of Education in 1980, is reproduced as an appendix to the government's brief filed in response to the petition in *Hillsdale College* v. *Department of Education*, No. 82-1538.

[4] The Higher Education Act of 1965 (Pub. L. No. 89-329, 79 Stat. 1232-1236) had provided Educational Opportunity Grants (20 U.S.C. (Supp. II 1965-1966) 1061-1069), the forerunner of the Supplemental Educational Opportunity Grant ("SEOG") program enacted in 1972 (20 U.S.C. (& Supp. V) 1070b *et seq.*). Both are campus-based programs in which the institution applies for funds from which it makes grants to eligible students. Grove City College does not participate in the SEOG program.

[5] The 1980 amendments to the statute raised the ceilings, over a period of several years, to $2600 for the 1985-1986 award year. 20 U.S.C. (Supp. V) 1070a(a)(2)(A)(i).

[6] Insofar as it applies to BEOGs, 20 U.S.C. (Supp. V) 1089(d) has been superseded by a series of statutes that in effect leave the

The program is administered through regulations promulgated by the Secretary of Education. 20 U.S.C. (Supp. V) 1070a(b)(3)(A).[7] To obtain a grant, the student must file an application containing the information and assurances the Secretary deems necessary. 20 U.S.C. (Supp. V) 1070a(b)(2).

The Secretary has established two procedures for computing and disbursing grants. Under the Regular Disbursement System ("RDS") the institution computes the grant amount, using criteria established by regulation, and distributes it to the student or credits the student's account (34 C.F.R. 690.78(a)). The Secretary estimates the amount the institution will need for grants, and advances that sum to the institution (34 C.F.R. 690.74). In the alternative, if the institution wishes, the Secretary will calculate and disburse the grants directly to students under the Alternate Disbursement System ("ADS"). 34 C.F.R. 690.91-690.96.

Under both systems the institution must certify that the student meets eligibility requirements for a BEOG (34 C.F.R. 690.4), is making satisfactory progress in his course of study, and is not in default on (or does not owe a refund on) any federal grant or loan. 34 C.F.R. 690.75, 690.94. The institution must also attempt to resolve any errors on the Student Eligibility Report submitted to it by the student (34 C.F.R. 690.77, 690.94(4)(b)), inform the Department or take appropriate action if a student withdraws or is expelled (34 C.F.R. 690.78(c), 690.95(a)), and maintain records relating to BEOGs (34 C.F.R. 690.83, 690.96).

2. A large number of Grove City students finance their education, in part, with federal grants and loans. Grove

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definition of the term to the Secretary. Pub. L. No. 97-301, Section 3, 96 Stat. 1400; Pub. L. No. 97-161, 96 Stat. 22; Pub. L. No. 97-92, Section 124(2), 95 Stat. 1197; see 34 C.F.R. 690.51-690.58.

[7] The statute assumes that schools will be involved in the computation and administration of grants. See, *e.g.*, 20 U.S.C. (Supp. V) 1094, 1096.

City has elected to participate in the Alternate Disbursement System, so that BEOGs are mailed to students after the institution makes appropriate certifications.[8]

The Department's regulations define "*Federal financial assistance*" as (34 C.F.R. 106.2(g)(1); emphasis added):

> (1) A *grant* or loan of Federal financial assistance, *including* funds made available for:
>
> * * * * *
>
> (ii) Scholarships, loans, *grants*, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or *extended directly to such students for payment to that entity.*

The regulations also define a "*Recipient*" of federal assistance as (34 C.F.R. 106.2(h)):

> [A]ny public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance * * *.

Because Grove City is thus a "recipient" of "Federal financial assistance," the Department requested that it file an Assurance of Compliance with Title IX, as required by 34 C.F.R. 106.4. After the College had refused on five occasions to sign the required assurance, the Department began enforcement proceedings. An administrative hearing was held, at which the sole issue was whether the College was a recipient of federal financial assistance.[9] The College acknowledged that it routinely

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[8] Although Grove City refused to execute an Assurance of Compliance with Title IX, it did execute an "'Agreement Regarding Institutional Participation in the Guaranteed Student Loan Program,'" pledging that "it would maintain records and establish policies consistent with maintaining the integrity of federally guaranteed student loans" (J.A. A23).

[9] There was no issue, and hence no evidence, concerning actual discrimination by the College. See Administrative Transcript ("Tr.") 11-12.

executed the institutional sections of BEOG application forms, and certified data concerning applicants' costs of education and enrollment status so that its students might receive BEOG assistance (Tr. 136, 178, 192-196, 199). See 34 C.F.R. 690.94-690.96.[10] Evidence at the hearing showed that approximately 50% of the College's operating budget comes from student tuition payments, and that some 140 students were BEOG recipients (Tr. 202; Pet. App. A7).[11] The College's president testified that the College "will not duplicate" aid its students receive through BEOGs (Tr. 189).

The administrative law judge ("ALJ") concluded that the College received federal financial assistance within the meaning of Title IX, and was thus required to execute an Assurance of Compliance. The ALJ entered an order terminating assistance until the College "satisfies the Department that it is in compliance" with the Department's Title IX regulations (Pet. App. A97).

3. The College then filed this action.[12] On cross-motions for summary judgment, the district court held that the College did not have to sign an assurance insofar as it required compliance with Subpart E (employment discrimi-

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[10] A student applying for a BEOG must submit an affidavit, with the concurrence of the certifying educational institution, that the grant "will be used solely for expenses related to attendance" at the institution (Tr. 57-58, 150). A College official thus certified "the tuition, room, and board costs charged to" two of the student petitioners (Marianne Sickafuse and Kenneth Hockenberry) (J.A. A61, A64).

[11] Marianne Sickafuse used her BEOG "to pay various educational expenses, including money [she] borrowed to pay tuition at the semester[']s beginning" (J.A. A62).

[12] The College was joined by four student BEOG and GSL recipients. Since GSLs are no longer at issue (see note 14, *infra*), it would appear that Jenifer Smith and Victor Vouga, who received only GSLs, have no further interest in the case. The record does not reflect whether Marianne Sickafuse and Kenneth Hockenberry are still enrolled at the College. We are informed by the Department of Education that they no longer receive BEOGs.

nation) of the Title IX regulations, since employment was beyond the scope of Title IX and the regulations were, in that regard, invalid (Pet. App. A76-A78).[13] The court also held that termination of assistance is a permissible remedy only where actual sex discrimination has been found (*id.* at A79).

4. The court of appeals reversed those determinations.[14] It observed that the language of Section 901(a), the legislative history, and relevant case law all indicated that an institution whose students paid for their education with federal aid was a recipient of federal financial assistance within the meaning of Title IX (Pet. App. A11-A22). Judge Garth and Judge Muir (sitting by designation) also concluded that in such cases the institution as a whole was a covered "program or activity" (*id.* at A23-A31). Judge Becker found this conclusion unnecessary to the decision. Since the College was required to sign an assurance if it conducted any covered "program," the court was in his view not required to define the outer contours of possible coverage (*id.* at A40-A44).

Turning to the regulations, the court noted (*id.* at A34-A35) that this Court had, since the district court's decision, upheld the validity of Subpart E in *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). The court of appeals went on to hold that Section 902 of Title IX permitted termination of assistance, not just upon proof of actual discrimination, but for any refusal to comply with valid departmental regulations (Pet. App. A35-A38). The court also rejected Grove City's argument that compliance with Title IX would infringe the First Amendment rights of the College and its students (*id.* at A32-A33).

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[13] This Court later upheld the validity of Subpart E. *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982).

[14] The Department did not appeal from the district court's determination (Pet. App. A75-A76) that GSLs—as "contract[s] of insurance or guaranty"—are excluded from Title IX coverage by Section 902, 20 U.S.C. 1682.

SUMMARY OF ARGUMENT

I. Grove City College operates an "education program or activity receiving Federal financial assistance" within the meaning of Title IX. It is thus required to execute an Assurance of Compliance with the nondiscrimination requirements of that title.

A. The College "receiv[es]" federal funds paid out in the form of Basic Educational Opportunity Grants. The purpose of the grants is to enable students to pay their Grove City tuition and expenses. The grants are measured by the cost of attendance at Grove City—defined as charges for tuition, fees, room, board, and similar expenses. A student's receipt of grant funds is contingent on his continued attendance, and reduced by the amount he (or his family) can contribute to the cost of attendance. In sum, the grant money is in fact used to pay for the student's education at Grove City. It is of little import that the student, not Grove City, is named as the payee of the federal check. Petitioners themselves admit that "assistance which is provided through another recipient to an educational program or activity is * * * within the scope of Title IX coverage" (Br. 17 n.17).

The "education program or activity" that receives these federal grants is the College's financial aid program, and it is that program that must comply with the requirements of Title IX. Consequently, subjecting schools whose students receive federal aid to the requirements of Title IX satisfies the statute's program-specific nature.

The statutory purposes of Title IX require that it be held to reach schools whose students receive federal financial aid. The BEOG program—whether under RDS or ADS—represents a substantial contribution to and subsidy for the College's financial aid and scholarship program. And Congress clearly intended that the entire "program or activity" into which federal money is channeled should be conducted in a nondiscriminatory fashion.

B. The legislative history of Title IX shows that Congress intended to eliminate sex discrimination in the pro-

vision of financial aid by schools that received federal funds for that purpose. The provision that was enacted as Title IX originated as an amendment to a bill whose most important feature was the creation of BEOGs. The Senate and House debates repeatedly show specific concern with discrimination by colleges in the provision of financial aid. Given that concern, and the general architecture of the bill, it seems clear that Congress intended schools receiving BEOG funds to be subject to Title IX.

C. Subsequent legislative action confirms the 1972 Congress's intent that colleges whose students receive BEOGs not be exempt from Title IX. Congress has reviewed and declined to disturb the very regulations that cover Grove City in this case; the Senate has rejected an amendment designed to exempt recipient schools from the requirements of Title IX; and Congress has repeatedly reenacted the BEOG statute, fully aware that recipient schools were being required to comply with Title IX.

D. The legislative history of Title VI—on which Title IX is modeled—also supports the conclusion that Grove City is subject to Title IX.

II. The court of appeals properly concluded that the Department could terminate BEOGs flowing to Grove City when the College refused to execute an Assurance of Compliance. Both the form and the regulation requiring its execution (34 C.F.R. 106.4(a)) are program-specific, applying "only to an 'education *program or activity* for which [Grove City] receives or benefits from Federal financial assistance'" (Pet. App. A42; emphasis in original). And there is no warrant in the statute or its history for petitioners' contention that funds may be terminated only upon a showing of actual discrimination. The assurance-of-compliance regulation is an integral part of a scheme for voluntary enforcement of Title IX—a scheme that would be completely frustrated if the petitioners' contentions were accepted.

III. The application of Title IX to the College does not infringe the First Amendment rights of the College or its students. The federal government has the power to fix the terms upon which it dispenses federal largesse, and neither schools nor their students are required to accept such aid.

ARGUMENT

I. GROVE CITY COLLEGE OPERATES AN "EDUCATION PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE" WITHIN THE MEANING OF TITLE IX

The principal issue in this case is a simple one. It is whether Grove City College must sign a Department of Education form stating that it will comply with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, insofar as that statute applies to the College. Section 901(a) of Title IX (20 U.S.C. 1681(a)) declares (emphasis added):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity receiving* Federal financial assistance * * *.

In this case the relevant "Federal financial assistance" is Basic Educational Opportunity Grants. Petitioners argue that because that assistance reaches Grove City only indirectly (through its students), and because the College has only a modest role in the distribution of BEOG funds, it conducts no "program or activity receiving" federal aid within the meaning of Title IX, and consequently that it need not sign the form.

This contention ignores the fact that the BEOG program directly subsidizes a financial aid program for the College; it does (at federal expense) precisely what the College does (at its own expense) through its own financial aid and scholarship program. The College's financial

aid program is therefore clearly a "program or activity receiving Federal financial assistance." The legislative history of Title IX supports this conclusion. In attaching Title IX to the statute creating BEOGs in 1972, Congress expressed particular concern that colleges were engaging in sex discrimination when handing out student financial aid, and that the federal government supported such discrimination by subsidizing student aid programs. Subsequent action by Congress has reemphasized its intent that colleges should be considered "recipients" of federal assistance when their students' education is paid for with federal financial aid funds. A similar conclusion emerges from the legislative history of Title VI, on which Title IX is in large part based.

A. When The Federal Government Pays Students' Tuition And Expenses, It Provides Assistance To The College's Financial Aid Program

Petitioners argue that requiring Grove City to sign an Assurance of Compliance is inconsistent in two ways with the language of Title IX. They argue first that the College is not "receiving" federal financial assistance within the meaning of Section 901 when its students pay for their education with BEOGs. Second, they claim that treating the College as a recipient of federal assistance is inconsistent with the "program or activity" restriction found in Title IX. Both of these arguments are without merit.

1. Petitioners' first argument (Br. 14-18) is that the Department's regulation, defining "recipient" as one who "receives or benefits" from federal financial assistance (34 C.F.R. 106.2(h)), is unfaithful to the more restrictive language used by Congress in Section 901.[15]

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[15] It is possible, as petitioners and several amici demonstrate, to conjure up meanings of the phrase "receives or benefits" that are inconsistent with Title IX. But it is frivolous to argue that "the landlord" and "the neighborhood tavern" are covered by Title IX because they may benefit from BEOG funds (Pet. Br. 32); or that

In fact, the regulations define the statutory term ("receiving") in an entirely sensible and natural way. The purpose of BEOGs is to pay for the education students get at Grove City. The grants are measured by the "cost of attendance" at Grove City. Congress has defined that cost as the students' charges for tuition, fees, room, board, and similar expenses. (See page 3 & note 6 *supra.*) The students' receipt of money is conditioned on continued attendance and satisfactory progress in their studies. 34 C.F.R. 690.94. Money that a student (or the student's family) can contribute toward the cost of attendance is subtracted from the amount of the BEOG, 20 U.S.C. (Supp. V) 1070a(a)(2)(A)(i), so that grants effectively *must* be used to pay for the students' education.[16] Not surprisingly, evidence at the administrative hearing in this case showed—and petitioners seem to concede—that Grove City's students use their BEOGs for just that purpose. See note 11, *supra;* Pet. Br. 10, 14.

It is unimportant that Grove City is not named as the payee of the checks issued by the federal government. Petitioners acknowledge that "assistance which is provided through another recipient to an educational pro-

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"a college is a recipient of federal financial assistance if it enrolls students who receive food stamps" (MSLF and AAPICU Br. 10). Neither the landlord nor the neighborhood tavern "operates an education program or activity" (34 C.F.R. 106.2(h)). Nor can food stamps, unlike BEOGs, be considered "Federal financial assistance * * * *extended* directly or through another recipient" to some "education program or activity" (*ibid.*; emphasis added). The very purpose of BEOGs, unlike food stamps, is to pay the cost of students' education.

[16] In the case of other forms of federal student aid disbursed by the school, the money may be simply credited to the student's account with the institution. See, *e.g.*, 34 C.F.R. 674.16(f)(2) (National Direct Student Loans); 34 C.F.R. 676.16(c)(2) (Supplemental Educational Opportunity Grants); 34 C.F.R. 690.78(a) (BEOG—Regular Disbursement System).

The 1981 regulations cited by petitioners (Br. 5 n.9), which broadened the allowable costs of attendance, have been revoked. 46 Fed. Reg. 37862 (1981).

gram or activity is * * * within the scope of Title IX coverage" (Br. 17 n.17). That is so, they say, when a college receives federal funds via a state agency. Petitioners offer no reason why a different interpretation is warranted when the college receives federal funds via its students. The language of Title IX "requires only federal assistance—not payment—to a program or activity for Title [IX] to attach." *Bob Jones University* v. *Johnson*, 396 F.Supp. 597, 602 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).[17]

2. Petitioners next argue (Br. 18-21) that treating Grove City as a recipient of federal assistance is inconsistent with the "program or activity" restriction found in Title IX. The plurality opinion in the court of appeals in this case concluded that "[b]ecause the federal grants made to Grove's students necessarily inure to the benefit of the entire College, the 'program' here must be defined as the entire institution of Grove City College" (Pet.

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[17] Petitioners state at one point (Br. 21) that "students' use of their grant funds at educational institutions are payments for services rendered rather than assistance"—as if this distinguished BEOGs from other federal funds received by a college. But petitioners' proposal is really only another way of saying that Congress expected a certain kind of return on the federal investment in education, and that characterization aptly describes any kind of federal "assistance." When a school receives federal money for "chemistry research" (Pet. Br. 20), Congress wants the school's chemistry faculty to devote time and effort to chemistry research. When Congress gives money to the states for vocational education, and the states pass it on to counties, cities, or school districts, Congress intends that the ultimate recipients will "develop and carry out * * * programs of vocational education * * *." 20 U.S.C. 2301(3); cf. 110 Cong. Rec. 13126-13128, 13130 (1964) (remarks of Sen. Ribicoff); *id.* at 13418 (remarks of Sen. Keating) (local government subrecipients of financial aid to education are subject to Title VI). The issue is no different when Congress supplements a college's financial aid program with BEOG money that flows back to the school: Congress's purpose is that the money be used for the education of the student beneficiaries.

App. A31; footnote omitted).[18] Apparently convinced that the choice is between such institution-wide coverage and no coverage at all, petitioners contend that the latter outcome is necessary if the program-specific language of Title IX is to be given any meaning. In fact, the dilemma petitioners pose does not exist.

a. We believe that the court of appeals plurality's expansive interpretation of the scope of Title IX coverage does not properly construe the statute as interpreted by this Court in *North Haven, supra*. The plurality reasoned that BEOG funds received by the College can be put to use anywhere in the school, and that a rule requiring the tracing of those monies would render the termination sanction ineffective (Pet. App. A31). The plurality also concluded that BEOG funds, wherever used, free up money for use elsewhere in the school (*id.* at A27, A28-A29 n.25).

Accepting either of these lines of analysis would wholly obliterate the "program or activity" limitation contained in Sections 901 and 902 (20 U.S.C. 1681, 1682). Most colleges and universities in the United States receive some federal funds by way of student aid. Since Title IX coverage does not depend on the *amount* of federal aid received,[19] the proposition advanced by the court of appeals would mean that if one student paid for his education with one dollar of BEOG funds, the entire school

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[18] The government's brief in the court of appeals, filed shortly before this Court's decision in *North Haven, supra*, argued that the Title IX "regulations *are* program specific. * * * [T]he regulation implicitly provides that the mere receipt of some federal assistance by an educational institution does not necessarily subject all of its practices to the prohibitions of Section 901 of Title IX and the implementing regulations. Questions may arise in particular cases concerning how to define 'program or activity' with respect to particular practices * * *. However, those issues are not present here." Brief for the Appellees-Cross-Appellants at 30 (emphasis in original).

[19] Coverage is instead limited by the "program or activity" rule, which confines coverage to the assisted portion of the school's operations.

would automatically be subject to Title IX.[20] That in turn would suggest that all employees at virtually all institutions of higher education in the country are covered by the Subpart E regulations, notwithstanding this Court's explicit direction in *North Haven* that those regulations not be given such universal application. 456 U.S. at 535-540.

Further, the analysis of the court of appeals would apply with equal force even to federal funds earmarked for a particular use. If a school is given a grant to buy hardware for its computer science program, that federal money "frees up" the school's own funds for use in other programs and activities no less than BEOGs do. The consequence of the Third Circuit's devotion to economic realities is thus that the receipt of any federal money for any purpose brings the entire school within the ambit of Title IX. But as this Court stressed in *North Haven*, both the ban on sex discrimination in Section 901(a) (20 U.S.C. 1681(a)) and the fund-termination sanction authorized by Section 902 (20 U.S.C. 1682) are limited to the assisted program or activity. The Court pointed out that Congress "failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds" (456 U.S. at 537), and quoted Senator Bayh's statement that the " 'effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found' " (*ibid.*).

In sum, the question of Title IX coverage should be resolved not by following to the end the economic ripples generated by federal aid, but by a common-sense discern-

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[20] The court of appeals suggested (Pet. App. A32 n.28) that that draconian conclusion might be avoided if schools were to adopt "financial Chinese wall[s]" to channel the flow of federal monies within their operations. We think it unlikely, however, that if Congress had intended institution-wide coverage, it would have countenanced evasion of that obligation by the simple expedient of a change in accounting systems.

ment of what, in the most natural way, can be considered the educational "program or activity" assisted by federal aid.

b. Under that approach, we believe that the natural candidate as the "program or activity" of Grove City assisted by federal student aid is the College's entire financial aid program (including any financial aid dispensed from non-federal funds).

This solution sensibly accords with conventional nomenclature and organizational and budgetary practices at educational institutions. Virtually all such institutions have something *called* a financial aid (or "scholarship") program, administered by a financial aid office. The budget of such an office is normally a separate budgetary item. See, *e.g.*, *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. III, 422 (1979). The purpose of the program is specific and well-recognized: it enables schools to recruit students who otherwise could not afford to attend. Funds are commonly raised for the financial aid program from alumni and friends, and earmarked for that program. Federal aid to students can be seen as a subsidy of that program without in any way offending the program-specific nature of Title IX.

c. Petitioners' argument that Grove City conducts no federally assisted program or activity (because it does not itself distribute BEOG funds) rests on their assumption that the sole purpose of Title IX is to prevent schools from discriminating in the disbursement of federal money. It is true that, in the majority of federal student aid programs, funds are disbursed by the college itself to students selected by the school on the basis of the relevant criteria.[21] And petitioners concede (Br. 20 & 21 n.19)

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[21] In addition to BEOG funds under RDS, this is true for the following types of assistance: Supplemental Educational Opportunity Grants, 20 U.S.C. (& Supp. V) 1070b, 1070b-2(b); National Direct Student Loans, 20 U.S.C. (Supp. V) 1087aa, 1087cc(a);

that a college like Hillsdale College (see note 41, *infra*)—which has "campus-based loan and grant programs [and] * * * disburse[s] federal funds to eligible students"—is for that reason covered by Title IX.

The reason for applying Title IX in such cases is obvious: colleges may discriminate in dispensing the federal funds. But a college intent on discriminating can do so even under the Alternate Disbursement System for BEOGs. Under ADS the college, though it does not disburse federal funds, must certify that student applicants are making satisfactory progress in their courses of study (34 C.F.R. 690.94) and meet the eligibility requirements for BEOGs (34 C.F.R. 690.4)—matters not always determinable according to fixed criteria, and thus open to discriminatory administration.[22]

In any event, petitioners' argument takes too narrow a view of Congress's Title IX concerns. Congress did wish to prevent schools from putting identifiable federal dollars to discriminatory uses. But Congress was also concerned about federal participation in discriminatory college programs even where specific federal funds were not tainted. As Representative Mink stated in 1975:

> It is difficult to trace the Federal dollars precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of

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Fellowships for Graduate and Professional Study, 20 U.S.C. (Supp. V) 1134d, 1134f; and College Work Study Programs, 42 U.S.C. (Supp. V) 2751, 2753.

[22] Moreover, the fact that there are limited opportunities to discriminate in handling BEOGs under ADS is simply a consequence of the regulations now in effect. As we noted above (note 7), Congress assumed that colleges would be involved in the administration of BEOGs, and left the details of that involvement up to the Department.

> Congress to prohibit sex—or race or national origin—discrimination in the room with the title I projector, while allowing it in the adjacent room.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 166 (1975) ("*1975 Hearings*").

Precisely the same incongruity can occur in the operation of a school's financial aid program. When Congress authorized BEOG funding for needy students' educational expenses, it undertook a financial burden that colleges would otherwise have shouldered alone through their scholarship and financial aid programs. As Grove City's president testified in this case, the College now "will not duplicate" aid its students receive through BEOGs (Tr. 189). By paying such costs Congress thus provides assistance to a school's financial aid program in the same way it provides assistance to a fine arts program by paying for slide projectors. See *Hillsdale College* v. *Department of Health, Education & Welfare*, 696 F.2d 418, 429-430 (6th Cir. 1982), petition for cert. pending, No. 82-1538. But "[i]t surely is not the intent of Congress to prohibit sex * * * discrimination in the room [where federal aid is handed out to incoming students], while allowing it in the adjacent room [where the school's own scholarship funds are disbursed]." Rather, Congress intended that the entire "program or activity" into which federal money is channeled should be conducted in a nondiscriminatory fashion *even so far as the school's own money is concerned.*[23]

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[23] For this reason, petitioners read the phrase "program or activity" too narrowly when they argue (Br. 20) that "the concept of a recipient program or activity under Title IX must be coextensive with the scope of the underlying grant statute." In fact, the language of the statute unmistakeably refers in Section 901 to the relevant "program or activity" *at the school*. Thus it speaks of "any education program or activity *receiving* Federal financial assistance" (20 U.S.C. 1681(a); emphasis added); of "any program or activity *of* any secondary school or educational institution" (20

There is still another aspect to the problem of discrimination in the administration of BEOGs. Even if such grants are administered under ADS, a school can exercise a veto against beneficiaries on the basis of sex by discriminating on the basis of sex in its admissions.[24] The school, though it plays only a limited role in disbursement, can thus deny women applicants the benefit of federal financial aid by refusing them the education it is meant to buy.[25] Even if the school receives no other form

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U.S.C. 1681(a)(7)(B); emphasis added (cf. *id.* section 1681(a)(7)(A) ("[a]ny program or activity *of* the American Legion") (emphasis added)); and of "any federally *supported* program or activity" (20 U.S.C. 1681(b); emphasis added).

This point also sheds light on why the court of appeals erred in reading the "program or activity" language too broadly. The court argued that *North Haven*, *supra*, "implicitly adopt[ed] an institutional approach to the concept of program" (Pet. App. A25; footnote omitted). The Third Circuit relied, for that conclusion, on a footnote in Justice Powell's dissent criticizing the majority for extending coverage beyond "employees who directly participate in a federal program, *i.e.*, teachers who receive federal grants" (456 U.S. at 542 n.3). As the text above makes clear, however, coverage of such employees by no means entails "an institutional approach to the concept of program * * *." If the federal government subsidizes the chemistry program by paying for the construction of a chemistry building, the recipient school may not discriminate against female chemistry teachers even if their salaries are all paid out of the school's own funds. It is, on the other hand, equally inconsistent with Title IX's "program or activity" language to say that the federal grant for the chemistry building makes the entire college a covered "program."

[24] Title IX applies generally to the admissions policies of professional and graduate schools, and *public* undergraduate schools. 20 U.S.C. 1681(a)(1); see also 20 U.S.C. 1681(a)(2) and (5); *Mississippi University for Women* v. *Hogan*, No. 81-406 (July 1, 1982). Grove City College's admissions policies would thus be exempt.

[25] See *Rice* v. *President & Fellows of Harvard College*, 663 F.2d 336, 339 n.2 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982) ("One who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted.");

of federal financial assistance, such discrimination in admissions can carry over to the BEOG program; Title IX coverage insures that BEOGs are not—in this indirect way—disbursed in a discriminatory manner.

To summarize: applying Title IX to Grove City's financial aid and scholarship program as a whole satisfies the statute's program-specific nature. It also helps effectuate the statutory purpose even though the federal grants do not go directly to the College: it prevents direct and indirect discrimination in the use of federal funds, and assures that the federal government does not contribute to a discriminatory educational program.

B. The Legislative History Of Title IX Shows That Congress Intended To Eliminate Sex Discrimination In The Provision Of Financial Aid By Recipients Of Federal Funds

The legislative history of Title IX supports the conclusion that Grove City's financial aid program is "receiving Federal financial assistance." In the Education Amendments of 1972—which created the BEOG program—Congress simultaneously enacted Title IX, in part because of its concern that colleges were engaging in sex discrimination when handing out student financial aid, and that the federal government supported such discrimination through its assistance to student aid programs.

Board of Public Instruction v. *Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969) (Title VI) ("If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper."); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376, 1387-1388 (E.D. Mich. 1981); *Bob Jones University* v. *Johnson*, *supra* (Title VI).

Some courts have extrapolated from this principle of an admissions-veto the more general theory that discrimination in one program or activity can "infect" other programs—including federal student aid programs. *Iron Arrow Honor Society* v. *Heckler*, 702 F.2d 549 (5th Cir. 1983), petition for cert. pending, No. 83-118. That is, of course, not a matter that the Court need reach in this case.

1. *House*

a. The movement toward what became Title IX began in 1970, when a special House subcommittee on education chaired by Representative Green conducted hearings on discrimination against women. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., Pts. 1 & 2 (1970) ("*1970 Hearings*"). The bill considered during these hearings (H.R. 16098, 91st Cong., 2d Sess. § 805 (1970)) would have amended Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) to include a prohibition against sex discrimination. Although the hearings covered a broad range of topics, special attention was devoted to the problems of women students, specifically including discrimination in admissions and in the provision of financial aid. Those who addressed those problems concluded that a federal solution was appropriate, given the pervasive nature of federal assistance to colleges and universities.

Representative May, for example, stated (*1970 Hearings, supra*, Pt. 1, at 235):

> Discrimination upon the basis of sex has been going on for so long with respect to the students that it's criminal. Here we have this scholarship money—much of it, please bear in mind, is federal—going to students. Which students receive this scholarship money is decided upon by the individual colleges and universities—where there are often quota restrictions on women recipients. Thus, we find ourselves faced with a situation wherein federal funds are subsidizing discriminatory opportunities—and there is no way to get it back!

In a similar vein, Representative Mink stated (*id.* at 433):

> Scholarships and other forms of financial assistance are also distributed on a discriminatory basis, making it more difficult for women to afford a higher education.

Representative Griffiths argued (*1970 Hearings, supra*, Pt. 2, at 739):

> Many universities and colleges * * * discriminat[e] against women * * * by applying quotas for women in admission to both undergraduate and graduate training programs. They discriminate against them in awarding scholarships and providing financial assistance.

She added (*id.* at 740):

> 2,174 universities and colleges received $3,367 million from the Federal Government in fiscal year 1968. * * * Should the Federal Government close its eyes to such unjust discrimination and continue to provide the billions of dollars that help to support those unjust practices? [26]

The same problems were addressed by numerous other witnesses before the Committee.[27]

b. Although the 1970 proposal never emerged from committee, in the next year Representative Green introduced H.R. 7248, 92d Cong., 1st Sess. (1971), which contained a separate prohibition (Title X) against sex discrimination in federally assisted education programs and activities. Other provisions in the bill extended funding provided by the Higher Education Act of 1965 (Pub. L. No. 89-329, 79 Stat. 1219), including student assistance

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[26] Representative Griffiths cited figures on federal financial assistance from a report by the National Science Foundation, *Federal Support to Universities and Colleges, Fiscal Year 1968*, No. NSF 69-32 (Sept. 1969).

[27] See, *e.g.*, *1970 Hearings, supra*, Pt. 1, at 31 (Statement of Jean G. Ross); *id.* at 185, 187 (Fabian Linden, *Women in the Labor Force*); *id.* at 217-218, 231 (Ann Scott, *The Half-Eaten Apple*); *id.* at 301, 306 (statement of Bernice Sandler); *id.* at 313-314 (letter from Nancy Dowding to George Schultz); *1970 Hearings, supra*, Pt. 2, at 645-656 (testimony of Peter Muirhead); *id.* at 801-804 (*Women in the University of Chicago, Report of the Committee on University Women*).

in the form of educational opportunity grants, guaranteed student loans, and work-study. See H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 3-4, 15-34 (1971).

Most of the debate on Title X focused on the effect it would have on undergraduate admissions (117 Cong. Rec. 39248-39261 (1971)). But it was clearly understood that schools which accepted federal student aid would be covered by the nondiscrimination provision. When Representative Erlenborn proposed exempting undergraduate admissions from the bill, he said (117 Cong. Rec. 39260 (1971)):

> In the same bill where we are holding out the prospect of putting Federal funds in every institution of higher education so that every institution will then come under the terms of title X, we are then saying "but if you take this money or any other Federal funds we are then going to determine for you what your administration practice should be."

Speaking in support of Representative Erlenborn's amendment, Representative Steiger said (117 Cong. Rec. 39257 (1971)):

> [U]nder the bill, under the titles which we have gone over before, we have in effect allowed the local financial assistance officers to have a rather broad sweep of powers in their right to pick and choose those who should receive aid which could work against low-income students, but in this one we now are going to say that it is the Federal policy that you cannot discriminate because of sex. This dichotomy confuses me[:] on [the] one hand we grant latitude and autonomy while on the other limiting autonomy.

When the bill was reported out of committee, the Supplemental Views subscribed to by several members noted that "[f]ederal dollars now constitute over 20% of the total budget of our higher education system. Most of these dollars *flow to institutions through* research contracts, *student assistance programs*, and categorical pro-

grams related to specific national objectives." H.R. Rep. No. 92-554, *supra*, at 244 (emphasis added).

Although H.R. 7248 was passed by the House in 1971 —and the Senate passed S. 659, its own version of the higher education bill—no legislation was agreed on in that session.[28]

c. The views of the House in 1970 and 1971 are of course not authoritative with respect to Congress's intentions when it later adopted Title IX. But they do offer valuable evidence of the House's ultimate concerns and objectives. There can be no doubt that one of the House's reasons for wanting to forbid sex discrimination in higher education was the belief that women were treated unfairly in the distribution of financial aid. It is also clear that the House saw federal student assistance programs as a form of aid to colleges themselves. Finally, it was contemplated that the receipt of federal student aid money would subject a school to the nondiscrimination requirements of the House bills.

2. *Senate*

a. In 1971 Senator Pell introduced the Education Amendments of 1971 (S. 659, 92d Cong., 1st Sess.), which contained what he called "a radical approach to Federal aid to education, in that it provides, as a matter of right, a basic educational opportunity grant * * * to every student pursuing a postsecondary education at an institution of higher education." 117 Cong. Rec. 2008 (1971). S. 659 had numerous other objectives (see *id.* at 29339-29341), but what chiefly made the bill "landmark in nature" was "the unprecedented principle of an

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[28] H.R. 7248 was amended in several respects, passed by the House (117 Cong. Rec. 39354, 39374 (1971)), and laid on the table when S. 659, amended by substitution of the House language, was passed in lieu. 117 Cong. Rec. 39374 (1971). This bill was sent back to the Senate, referred to its Committee on Labor and Public Welfare, and reported back to the Senate with recommendations for further amendments. S. Rep. No. 92-604, 92d Cong., 2d Sess. 1-2 (1972).

assured minimum level of support for every American who seeks a postsecondary education" (*id.* at 29342, 29344 (remarks of Sens. Pell, Prouty, and Proxmire)). Senator Bayh described the "Pell bill" as "the most far-reaching program of Federal aid to higher education ever debated in [the Senate]" (117 Cong. Rec. 30156 (1971)).[29]

It was this bill that Senator Bayh proposed to amend by adding what became Title IX. 117 Cong. Rec. 30155, 30403 (1971). When introducing his amendment, Senator Bayh stated (*id.* at 30403):

> Now we are attempting to establish access to higher education as a basic Federal right. By establishing a minimum level of scholarship assistance for each needy student who wishes to pursue postsecondary education, we hope to break forever the bonds that have tied generation upon generation to the ghettoes and economic backwaters of America.
>
> But as we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other, more subtle but still pernicious forms of discrimination. * * * Today I am submitting an amendment to this bill which will guarantee that women, too, enjoy the educational opportunity every American deserves.

Senator Bayh's proposed amendment did not contain a program-specific limitation; its primary focus (insofar as it affected students) was on "admission to * * * educational facilities" (*ibid.*). See 117 Cong. Rec. 30406 (1971) (remarks of Sen. Bayh); *id.* at 30407 (remarks of Sen. Dominick); *id.* at 30409 (remarks of Sen. Gurney); *id.* at 30410 (remarks of Sen. Byrd). In the event discrimination occurred in admissions programs, Senator Bayh suggested that his amendment would authorize

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[29] In the Education Amendments of 1980, Congress redesignated the "basic educational opportunity grants" as "Pell grants." 20 U.S.C. (Supp. V) 1070a(a)(1)(C).

termination of all assistance, including Pell grants (*id.* at 30408; emphasis added):

> Mr. DOMINICK. What type of aid the recipient might be getting would be cut off? * * *
> Mr. BAYH: We are cutting off *all* aid that comes through the Department of Health, Education, and Welfare * * *.[30]

Senator Bayh's explanation was confirmed by Senator McGovern, who said (117 Cong. Rec. 30158-30159 (1971); emphasis added):

> I urge the passage of this amendment to assure that *no funds from S. 659* * * * be extended to any institution that practices biased admissions or educational policies.

The Presiding Officer ruled that the amendment was not germane, and his ruling was sustained (*id.* at 30412, 30415).[31]

b. On February 28, 1972, Senator Bayh introduced an expanded version of his 1971 amendment (now designated Amendment No. 874 and proposed as an additional

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[30] Petitioners quote this same exchange in support of their claim that student aid was not considered to be "Federal financial assistance" (Br. 24-25). It is true that Senator Bayh went on to say that "this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution" (117 Cong. Rec. 30408 (1971)). But it seems clear from the context that Senator Bayh meant simply that the student would be free—as he is free today—to receive federal financial assistance in order to attend another university, even if the institution to which he first applied was denied the benefit of such funds because it discriminated. See pages 33-34, *infra*.

[31] Senator Bayh, appealing the Chair's ruling, said (117 Cong. Rec. 30412 (1971)):

> This amendment relates directly to the central purpose of the bill being debated.
> The bill deals with equal access to education. Such access should not be denied because of poverty or sex.
> * * * * *

"Title X" to S. 659).[32] Unlike Senator Bayh's 1971 proposal the 1972 version was clearly "program-specific"—*i.e.*, its prohibition reached only educational programs or activities receiving federal financial assistance, and it limited "termination of funds * * * to the particular entity and program in which * * * noncompliance has been found" (118 Cong. Rec. 3937, 5807 (1972) (remarks of Sen. Bayh)). The change was not, however, intended to narrow the concept of what constitutes "receipt" of federal aid, or to exempt schools whose students receive federal grants.[33] Any other conclusion would be

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[32] The Senate Committee on Labor and Public Welfare, after considering the House's amendments to S. 659 (see note 28, *supra*), reported the bill out on February 7, 1972 with recommendations for further amendments. S. Rep. No. 92-604, 92d Cong., 2d Sess. (1972). As reported out of committee, S. 659 was entitled "The Education Amendments of 1972."

[33] Senator Bayh's 1972 amendment took the same view of "receiving Federal financial assistance" as his 1971 amendment. Schools whose students' education is paid for with BEOGs are still considered *recipients*. On the other hand, the *scope of coverage* of recipient schools was significantly altered by the new "program or activity" limitation. The 1972 amendment provided, in terms identical to the language ultimately enacted, that "termination * * * shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found" (118 Cong. Rec. 3938 (1972)). As Senator Bayh stated (*id.* at 5807), "[M]y amendment * * * would prohibit discrimination on the basis of sex in federally funded education programs. * * * The effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found * * *." See *North Haven*, *supra*, 456 U.S. at 537-538.

This conscious change to a rule of program specificity would have been nothing more than a formal exercise if one adopted the court of appeals' conclusion that "the 'program' here must be defined as the entire institution of Grove City College" (Pet. App. A31). The prevalence of BEOGs (created by the very Act to which Title IX was appended) and other forms of federal student aid means that

indeed surprising, since one of the primary purposes of Bayh's amendment was to eradicate discrimination in the provision of student financial aid.

In announcing Amendment No. 874, Senator Bayh stated: "I have introduced * * * an amendment which would deal in a comprehensive way with sex discrimination in education—in admissions, *scholarship programs*, faculty hiring, and the pay of professional women" (118 Cong. Rec. 3935 (1972); emphasis added).[34] Senator Bayh elaborated on those concerns by introducing a prepared statement dealing with the three primary targets of his amendment: "A. DISCRIMINATION IN HIRING AND PROMOTION OF FACULTY AND ADMINISTRATORS"; "B. DISCRIMINATION IN SCHOLARSHIPS"; and "C. DISCRIMINATION IN ADMISSIONS" (*id.* at 3935-3940). Several days later Senator Bayh introduced, as "particularly relevant to my amendment No. 874," an article addressing at some length discrimination in the provision of financial aid (*id.* at 5654, 5656). It noted that (*ibid.*; footnotes omitted):

> [W]omen constitute about 43% of all students receiving national defense loans, 49% of students benefiting from the work-study college program, 40.2% of those receiving equal opportunity grants and 36.5% of those participating in the guaranteed loan program.
>
> Complaints of discrimination have centered upon financial assistance for graduate study. * * * In 1969 women represented 33% of the graduate student population; they received 28% of the awards given under the NDEA Title IV fellowship program for graduate students and 29.3% of graduate academic awards under NDEA Title VI.

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there are few—if any—cases involving higher education to which the "program or activity" limitation could apply if unearmarked student financial aid triggered institution-wide coverage.

[34] Senator McGovern had noted the same issues several weeks earlier (118 Cong. Rec. 274 (1972)).

When Amendment No. 874 was called up for debate on February 28, 1972, Senator Bayh summarized it thus: "The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions" (118 Cong. Rec. 5803). He then addressed each of these problems at more length. Regarding "discrimination in scholarships" he said (*id.* at 5805):

> Although documentation of discrimination in scholarship aid is less conclusive than in other areas, a recent study by the Education Testing Service found that although men and women need equal amounts of financial aid in college, the average awards to men are $215 higher than to women.

See also 118 Cong. Rec. 5807, 5808 (1972). He continued (*id.* at 5809):

> In the 35 most selective schools in the country * * * women comprise 29.3 percent of entering freshmen in 1970; although men and women need equal amounts of financial aid in college, the average awards to men are significantly higher than awards to equally qualified women. For example, the average single awards such as scholarships, loans, or jobs in an institution, to a man student in 1970 was $760, and to a woman student $518.
>
> If we look at the broader types of financial assistance—various packaged awards, such as grants with jobs, or loans—it shows that the average such package award in 1969-70 to the average man student was $1,465 and to the average women student it was $1,173.
>
> I do not think we have any evidence at all to support the contention that it costs less to clothe, house, feed, and educate a woman. Yet there is obvious discrimination when it comes to passing out the scholarship dollars.

See also *id.* at 5810 (paper on *The Status of Women*); *id.* at 5813 (letter from The National Federation of Business and Professional Women's Clubs, Inc.).[35]

That the Senate viewed schools as "receiving Federal financial assistance" when their students got federal aid was explicity recognized in debate on Senator Bentsen's perfecting amendment to Amendment No. 874. Senator Bentsen proposed that the admissions practices of traditionally single-sex public undergraduate schools be exempted from the nondiscrimination rule (118 Cong. Rec. 5814 (1972)). In explaining the need for his amendment, he pointed out that Texas Woman's University, which was forbidden by state law from admitting male students, received "over $250,000 in educational opportunity grants" and "$83,000 for college work-study programs" (*ibid.*). The effect of Amendment No. 874, he argued, would be to subject the University to Title IX coverage because of that assistance. Senator Bentsen's amendment was agreed to. 118 Cong. Rec. 5815 (1972).

Senator Bayh's Amendment No. 874 was passed by the Senate on the same day it was introduced (118 Cong. Rec. 5815 (1972)). The House and Senate conferees, meeting on their differing versions of S. 659 (see note 28, *supra*), adopted "the substance of the Senate" SEOG program, which was "viewed as the foundation upon which all other Federal student assistance programs are based." S. Conf. Rep. No. 92-798, *supra*, at 167. Differences about the final form of Title IX related only to exceptions not relevant here. *Id.* at 221-222.

c. The Senate's deliberations, like the House's, focused specifically on the problem of discrimination in college financial aid programs. The debates show a serious concern with colleges' handling of federal student aid ("national defense loans," "work-study," "equal opportunity grants," "NDEA Title IV," "NDEA Title VI" (118

[35] See also National Commission on the Financing of Postsecondary Education, *Financing Postsecondary Education in the United States* 148 (Dec. 1973).

Cong. Rec. 5656 (1972)). Senator Bayh's explanations of his own amendment also address a broader problem—not the handling of identifiable *federal* dollars, but the administration of college financial aid programs *generally*. He repeatedly stated that one of the purposes of Title IX was to "cover[] discrimination in * * * scholarship aid" (*id.* at 5807).

It seems clear that the Senate intended Title IX to regulate recipient schools insofar as they administered federal student aid dollars. But as the discussion of Senator Bentsen's amendment illustrates, Title IX was intended to do more. It was to govern recipient institutions not just with respect to the disbursement of specifically identifiable *federal* monies, but also with respect to the other activities of the relevant educational "program or activity." The federal government was to end the practice of subsidizing the discrimination practiced by the entire program or activity.

The final—and compelling—point about the legislative history of Title IX is architectural rather than linguistic. Title IX was an amendment to a bill whose most important feature was the creation of BEOGs. The sponsor of Title IX stated that his amendment "relate[d] directly to the central purpose of the bill" (117 Cong. Rec. 30412 (1971)). Given that direct connection, it defies belief that Congress meant to permit discrimination to exist in the financial aid programs of schools whose students are subsidized by BEOG grants.

C. Subsequent Legislative Action Confirms Congress's Intent That Title IX Should Apply To Colleges Whose Students Receive BEOGs

"Although postenactment developments cannot be accorded 'the weight of contemporary legislative history'" (*North Haven*, *supra*, 456 U.S. at 535), certain "subsequent events * * * lend credence to the [Department's] interpretation" of the phrase "'program or activity receiving Federal financial assistance'" (456 U.S. at 537). Congress reviewed the regulations extending Title IX

coverage to colleges like Grove City, and chose to leave them undisturbed. Congress also considered and rejected legislation specifically designed to exempt schools receiving only federal student assistance. Finally, Congress has repeatedly reenacted the BEOG statute with full awareness that such aid triggers Title IX coverage.

1. Pursuant to the direction of Section 902 (20 U.S.C. 1682) HEW promulgated sex discrimination regulations. The regulations provided, in terms identical to those now in effect, that "*Federal financial assistance*" includes "[a] grant or loan of Federal financial assistance, including funds made available for * * * [s]cholarships, loans, [and] grants * * * extended directly to * * * students for payment to" a college. 40 Fed. Reg. 24137 (1975); cf. 34 C.F.R. 106.2(g)(1). They also stated that the term "*Recipient*" includes "any public or private * * * institution * * * to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance * * *." 40 Fed. Reg. 24137 (1975); cf. 34 C.F.R. 106.2(h).

As required by Section 902, the regulations were submitted to President Ford for his approval. They were then transmitted to the Speaker of the House and the President of the Senate, pursuant to Section 431(d)(1) of the General Education Provisions Act, 20 U.S.C. (1970 ed. Supp. IV) 1232(d)(1).[36] Under Section 431(d) the regulations would become effective 45 days after transmittal unless Congress, by concurrent resolution, found that they were inconsistent with the authorizing statute and disapproved them.

The House held six days of hearings during which HEW Secretary Weinberger specifically addressed the Department's conclusion that the term "Federal financial assistance" covered federal aid to students. *1975 Hear-*

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[36] This section was made applicable to Title IX regulations by Section 431(f) of the same statute. 20 U.S.C. (1970 ed. & Supp. IV 1974) 1232(f).

ings, supra, at 481-484.[37] In response to a question by Representative Quie, Secretary Weinberger said (*id.* at 484):

> Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.
>
> As Mr. Rhinelander [the HEW General Counsel] says, the court case confirms this belief.[38]

Senator Bayh was asked during the hearings whether the Department had "overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program" (*1975 Hearings, supra*, at 182). He answered that he did not know, and

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[37] Representative O'Hara, chairman of the subcommittee, stated (*1975 Hearings, supra*, at 412):

> I always used to think, until I became chairman of this subcommittee, that student assistance was student assistance, and after I proposed changes in it and started to hear from institutions I discovered it was a disguised institutional assistance and not student assistance.
>
> * * * [T]here is an institutional aid aspect, because whenever someone proposes changing a program a little bit they immediately hear from institutions saying: Wait a minute, your change will hurt our kind of institution or would help some other kinds of institutions.

[38] Secretary Weinberger was referring to *Bob Jones University v. Johnson, supra*, which construed the parallel provisions of Title VI in an analogous context. There 221 of some 4500 students in the university were receiving Veterans Administration ("VA") benefits. Like Grove City, Bob Jones refused to execute an Assurance of Compliance required by the VA before approving the university's educational program as one towards which VA benefits could be applied. The university contested coverage on the ground that it was not itself a direct recipient of federal financial assistance, since benefits were paid by the VA directly to students in a way similar to the Alternate Disbursement System for BEOGs. The district court rejected that argument. 396 F. Supp. at 603.

would have to look into the question (*ibid.*).[39] He did point out that the student could "take that scholarship and go anyplace [he] want[ed] to" (*id.* at 181). When asked the same question, Secretary Weinberger stated that "the Federal financial assistance *to that institution* might well be cut off. * * * I don't think you would take the assistance away *from the student* who was denied admission[;] * * * you would let him take it and use it somewhere where there was not a violation" (*id.* at 482; emphasis added).

Resolutions were introduced in both Houses of Congress to disapprove the regulations in their entirety. S. Con. Res. 46, 94th Cong., 1st Sess. (1975), see 121 Cong. Rec. 17300 (1975); H.R. Con. Res. 310, 94th Cong., 1st Sess. (1975), see 121 Cong. Rec. 19209 (1975). Neither was passed.[40]

2. In 1976 Congress rejected legislation specifically aimed at exempting schools receiving student aid from Title IX controls. Senator McClure introduced an amendment to Section 901 providing that, for purposes of Title IX, "federal financial assistance received means assistance received by the institution directly from the federal government." 122 Cong. Rec. 28144 (1976). By way of justification for his amendment, Senator McClure noted (*id.* at 28145) that Hillsdale College had been subjected

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[39] Senator Bayh later defended the Department's conclusion that colleges are recipients of "Federal financial assistance," opposing an amendment which would effectively have removed student aid from the reach of Title IX. See pages 35-36, *infra*.

[40] Approximately four months after the regulations went into effect, Congress amended 20 U.S.C. (1970 ed. Supp. IV) 1232(d)(1), to say that failure to adopt a concurrent resolution disapproving a final regulation should not "be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding." Pub. L. No. 94-142, Section 7(b), 89 Stat. 796. But as this Court noted in *North Haven*, "the postenactment history * * * does indicate that Congress was made aware of the Department's interpretation of the Act * * *."

to Title IX because some of its students received Federal assistance.[41]

Both Senator Bayh and Senator Pell opposed the amendment. Senator Pell noted that (122 Cong. Rec. 28145 (1976)):

> [w]hile these dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.

Senator Bayh argued that the Department had properly interpreted the statute when it promulgated the regulations in 1975, and that a reversal of its interpretation would thwart the purposes of Title IX. He stated (122 Cong. Rec. 28145-28146 (1976)):

> The House committee studied this [Departmental] interpretation. I emphasized at that time that title IX, which dealt with discrimination so far as women are concerned, is parallel in its language and enforcement expectations with title VI of the Civil Rights Act. The courts have held that title VI * * * does apply if a student receives Federal aid.[42] If a student is benefited, the school is benefited. It is not new law; it is traditional, and I think in this

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[41] Hillsdale College, an amicus in this case, was found by the Department after an administrative hearing to have violated Title IX by refusing to sign an Assurance of Compliance. Like Grove City, Hillsdale does not apply for federal aid, but one-fourth of its students in 1978 financed their education through the use of Federal grants and loans. *Hillsdale College* v. *Department of Health, Education, & Welfare, supra*, 696 F.2d at 420. On appeal of the fund termination order, the Sixth Circuit agreed with the Department that Hillsdale is a recipient of federal financial assistance (696 F.2d at 424, 430). It nevertheless found the Assurance of Compliance form, as interpreted and applied by the Department, to be invalid (*id.* at 430). The court therefore reversed the Department's order terminating assistance (*ibid.*).

[42] Senator Bayh was referring to *Bob Jones University* v. *Johnson, supra* note 38.

> instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students.

The amendment was rejected.

3. The statutory authorization for BEOGs, first enacted together with Title IX in 1972, has since been renewed, with amendments but in the same basic form, in 1976, 1978, and 1980. Pub. L. No. 94-482, Section 121(a), 90 Stat. 2091; Pub. L. No. 95-566, Section ?, 92 Stat. 2402; Pub. L. No. 96-374, Section 402(a), 94 Stat. 1401. The history of the reenactments make clear both Congress's and the university community's understanding that BEOGs (and similar student aid programs) are a critical source of institutional support.[43] Indeed, Representative Ford called them "the primary means through which Federal support is provided to institutions of postsecondary education." *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 400 (1979); see *id.* at Pt. 4, 2.

Congress has been aware that the Department considered such aid to trigger Title IX coverage of recipient institutions. In 1975 it reviewed and declined to disapprove the Department's regulations directing that result. The Department's Title VI regulations were also amended in 1973 to include, in their Appendix, the provision that student receipt of BEOGs subjected institutions to Title VI coverage. See 34 C.F.R. Part 100 app. A. And although there is no comparable Title IX appendix of covered programs, the Commissioner of Education reiterated before a House subcommittee in 1978 that student receipt of federal education grants led to both Title VI and Title IX coverage. *Middle Income Student Assistance Act: Hearings on H.R. 10854 Before the Subcomm. on*

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[43] An index of such statements and testimony is attached at App. C, *infra*.

Postsecondary Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. 222-223 (1978).

This consistent post-enactment history underscores what is already clear from the language and history of Title IX. As this Court stated in *North Haven*, *supra*, 456 U.S. at 535:

> Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."

D. The Legislative History Of Title VI Supports The Conclusion That Colleges "Receiv[e] Federal Financial Assistance" When The Federal Government Pays For The Education Of Their Students

Petitioners argue (Br. 28-33) that the legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*—on which Title IX was in large part based (see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696 (1979))—also demonstrates a congressional intent to exempt from nondiscrimination laws assistance paid directly to student beneficiaries. In fact, the history of Title VI shows that Congress intended that title to reach schools whose students receive direct federal aid for their education.

Title VI expresses the national policy that "discrimination on the ground of race * * * shall not occur in connection with programs and activities receiving Federal financial assistance" (H.R. Rep. No. 914, 88th Cong., 1st Sess. 25 (1963)). As is true in the case of Title IX, Congress did not expressly define the phrase "receiving Federal financial assistance."[44] The legislative history nonetheless shows that Congress recognized its application to colleges like Grove City.

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[44] Opponents of Title VI noted this omission. 110 Cong. Rec. 9084, 9094 (1964) (remarks of Sen. Gore); *id.* at 13382, 13415 (remarks of Sen. McClellan).

The application of Title VI to a vast array of programs, including many in the field of education, was noted in both the legislative hearings and floor debates. Appearing before a House subcommittee, HEW Secretary Celebrezze provided a list of HEW programs that would be covered by Title VI. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1537-1538 (1963) (*"1963 Hearings"*). The list included "Loans to college students" and "National defense fellowships." Secretary Celebrezze also stated that Title VI would authorize HEW to withhold NDEA scholarships from students who attended segregated universities (*id.* at 1541).[45]

In the Senate, both opponents and supporters of the bill approved by the House indicated that Title VI would apply to schools whose students received direct federal education payments. Senator McClellan, describing programs that would be subject to Title VI, noted that the National Defense Education Act authorized "direct loans to college students and private schools, fellowships for graduate students and grants and contracts with private institutions" (110 Cong. Rec. 13388 (1964)). And in response to a question by Senator Gore about why religious discrimination was not forbidden, Senator Ervin noted that under the National Defense Education Act,

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[45] Secretary Celebrezze stated that "[a]ll our payments are to the institution, and if the institutions are going to be segregated * * * we will not give them funds." *1963 Hearings, supra*, at 1541. He then assented to Rep. Rodino's statement that Title VI gave "broad and sweeping power" to "withhold funds in most any program that you administer where there is direct or indirect financial assistance" (*id.* at 1542).

Petitioners note (Br. 29-30) the omission of the language "direct or indirect" in the bill that emerged from the committee after Celebrezze's testimony. Petitioners cite nothing in the legislative history to support their interpretation of this change. At least one Senator commenting on the bill approved by the House expressly rejected petitioners' contention that the bill excluded indirect funding from Title VI. See 110 Cong. Rec. 9084 (1964) (remarks of Sen Gore).

Congress made grants to individuals for tuition at religious schools (*id.* at 9088). Senator Ervin clearly envisioned that such grants would subject religious schools to Title VI coverage.

Many congressmen referred in floor debates to lists (prepared by the Library of Congress and the Department of Justice) of the kinds of federal aid affected by Title VI.[46] Some involved the payment of government funds to the student's institution. Other listed programs, however, involved or had statutory authority for direct payments to students. *E.g.*, National Defense Fellowships (20 U.S.C. (1958 ed. & Supp. V 1959-1963) 461-465), Foreign Language Fellowships (20 U.S.C. (1958 ed.) 511(b)), Public Health Traineeships (42 U.S.C. (1958 ed. & Supp. V 1959-1963) 242d), and National Science Foundation Fellowships (42 U.S.C. (1958 ed. & Supp. V 1959-1963) 1869).

The various comments collected by petitioners about Title VI's application to individual beneficiaries do not support the conclusion that Grove City is not a recipient of federal assistance. Remarks by Senator Humphrey (110 Cong. Rec. 6545 (1964)) and a letter from Attorney General Kennedy (*id.* at 10075-10076) suggest that people collecting social security and farmers getting direct federal aid would not be subject to Title VI. Obviously Title VI was not designed to authorize cutting off funds to these individual recipients if they engaged in racial discrimination.[47] Similarly, a letter from Deputy Attorney General Katzenbach states that an *individual* who receives direct federal payments such as social security would not be a "program or activity" under Title VI.

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[46] See, *e.g.*, 110 Cong. Rec. 13131 (1964) (list prepared by Library of Congress and introduced by Sen. Gore); *id.* at 13381-13382 (list prepared by the Department of Justice and introduced by Sen. McClellan); *id.* at 7085 (list of affected education programs presented by Sen. Sparkman); see also H.R. Rep. No. 914, *supra*, at 104-106 (Separate Minority Views of Reps. Poff and Cramer).

[47] 110 Cong. Rec. 6545 (1964) (Sen. Humphrey); *id.* at 10076 (Attorney General Kennedy).

1963 Hearings, supra, at 2773. But these comments are not relevant to the issue whether Grove City receives federal financial assistance by virtue of the award of BEOGs to its students. The types of aid referred to in Katzenbach's letter and by Senator Ribicoff on the Senate floor (110 Cong. Rec. 8424 (1964)) involved unrestricted payments from the government to individuals. They are altogether different from BEOGs, which are conditioned on a student's enrollment and continuing study in the educational institution that certifies eligibility for the grants.[48]

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[48] See page 4, *supra*.

Petitioners claim (Br. 33) that Title VI was not intended to apply to the War Orphans' Educational Assistance Act, Pub. L. No. 85-857, 72 Stat. 1192 (codified at 38 U.S.C. 1701 *et seq.*). But it is by no means clear that Senator Humphrey's statement cited by petitioners (110 Cong. Rec. 11848 (1964)) refers to the educational benefits provided by the Act. It is in fact more likely that Senator Humphrey had in mind a number of provisions for unrestricted payments directly to individuals that are analogous to Social Security payments. See 38 U.S.C. (1958 ed. & Supp. V 1959-1963) 401 *et seq.* (dependency and indemnity compensation to widows, children, and parents for service-connected death of veteran); 38 U.S.C. (1958 ed. & Supp. V 1959-1963) 531-543 (payment of pensions for non-service-connected disability or death to children or widow of veteran).

Even if Senator Humphrey had referred to the War Orphans' Educational Assistance Act, it is open to doubt whether his conclusion of Title VI's inapplicability was universally shared. The Veterans Administration determined that Title VI applied to this program in regulations issued in 1968. 33 Fed. Reg. 10516 (1968). And in *Bob Jones University* v. *Johnson, supra*, the court affirmed the Veterans Administration's reliance on these regulations to conclude that a university was subject to Title VI if it enrolled veterans receiving educational benefits analogous to those provided by the War Orphans' Educational Assistance Act.

II. THE DEPARTMENT MAY PROPERLY TERMINATE ASSISTANCE TO GROVE CITY BECAUSE IT REFUSED TO EXECUTE AN ASSURANCE OF COMPLIANCE WITH TITLE IX

Petitioners argue that even if Grove City does receive federal financial assistance and is subject to the requirements of Title IX, the court of appeals erred in upholding termination of student grants when the College refused to execute an Assurance of Compliance. They claim (Br. 38-42) that the Department's Form 639 by its terms is inconsistent with the program-specific limitation of Title IX. They also argue (Br. 42-47) that student assistance cannot be terminated absent proof of actual discrimination. Both of these contentions are without merit.

A. The Department's Assurance Requirement Is Consistent With The Program-Specific Limitation Of Title IX

As was true of the employment discrimination regulations upheld in *North Haven*,[49] the Assurance of Compliance form (see note 3, *supra*) and the Department's assurance regulation are consistent with the program-specific limitation on Title IX coverage. Form 639 itself simply requires an applicant for assistance to state that it will "[c]omply, *to the extent applicable* to it, with Title IX * * * and all *applicable* requirements imposed by * * *

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[49] The Court in *North Haven* concluded (456 U.S. at 538) that the employment regulations were not "inconsistent with Title IX's program-specific character" because they were limited by 34 C.F.R. 106.1 (1980), which states their general purpose:

> to effectuate title IX[,] * * * which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance * * *.

The Court also noted that "HEW's comments accompanying publication of its final Title IX regulations * * * indicated its intent that the Title IX regulations be interpreted in" a program-specific fashion. 456 U.S. at 538-539.

regulation" (Pet. App. A126; emphasis added). The explanation accompanying the form declares "that each education program or activity operated by the applicant * * * to which Title IX * * * [and the regulations] *apply* [must] be operated in compliance with [the regulations]" (Pet. App. A130; emphasis added). The regulations require an assurance "that *each education program or activity* operated by the applicant or recipient and *to which this part applies* will be operated in compliance with this part" (34 C.F.R. 106.4(a); emphasis added). The phrase "this part" refers to the Title IX regulations in their entirety, which are restricted in their application to "each education program or activity operated by [a] recipient which receives or benefits from federal financial assistance" (34 C.F.R. 106.11).

Subpart D of the Title IX regulations (34 C.F.R. 106.31-106.42), which "sets forth the general rules with respect to prohibited discrimination in educational programs and activities" (40 Fed. Reg. 24128 (1975)), deals separately with various programs operated by institutions of higher education: "Housing" (34 C.F.R. 106.32), "Access to course offerings" (34 C.F.R. 106.34), "*Financial assistance*" (34 C.F.R. 106.37; emphasis added), "Athletics" (34 C.F.R. 106.41), and so on. It includes no indication that schools subject to the directives of Section 106.37 ("Financial assistance") are thereby covered by all other provisions in the regulations. As Judge Becker noted in his concurring opinion in the court of appeals: "[T]he Assurance of Compliance is program-specific, for it applies only to an 'education *program or activity* for which the Applicant receives or benefits from Federal financial assistance'" (Pet. App. A42; emphasis in original).

It is true, as petitioners point out (Br. 39-40 & n.40), that HEW Secretary Weinberger at the 1975 Hearings gave a more expansive view of the scope of the Title IX regulations than is now justified in light of this Court's decision in *North Haven*. See *1975 Hearings*,

supra, at 438, 485. But in *North Haven* this Court specifically referred to Weinberger's testimony and noted that the Department's views with respect to program specificity had "fluctuated" (456 U.S. at 539 n.29); it nonetheless found the regulations consistent with Title IX's program-specific character. Since that decision the Department has adhered to the Court's recommended reading of the regulations, which is entirely consistent with their explicit terms.[50] We see no reason to reconstruct for the assurance requirement an interpretation rejected by this Court and the Department, and out of step with the language of the statute.

B. Title IX Authorizes Termination Of Federal Assistance When A Recipient Refuses To Execute An Assurance Of Compliance

1. The Department of Education furnishes financial assistance to thousands of educational institutions. The passage of Title IX, like the earlier enactment of Title VI and the later adoption of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. (Supp. V) 794), imposed on the Department an obligation to ensure that federal assistance not be granted to recipients who engage in unlawful discrimination. Section 902 of Title IX directs the Department (20 U.S.C. 1682):

> to effectuate the provisions of section [901] * * * by issuing rules, regulations, or orders of general

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[50] As we stated in our response to Hillsdale College's petition for a writ of certiorari in No. 82-1538 (Brief for the Federal Respondents at 9):

> The Department does not contend that execution of an assurance acknowledges Title IX coverage of an entire institution regardless of the nature of the federal financial assistance. Rather, the Department agrees with the court of appeals that Title IX's nondiscrimination requirements apply only to those educational programs and activities of an institution that receive federal financial assistance. Accordingly, assurances of compliance must also be written and construed in a program-specific manner.

> applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance * * *. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of * * * assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement * * * or (2) by any other means authorized by law * * *.

The Department—like other federal agencies with large grant programs[51]—has adopted regulations requiring recipients to assure compliance with the nondiscrimination statutes and their implementing regulations.

The good faith representations provided by the Assurance of Compliance are intended to substitute, as a threshold matter, for departmental inspections and other more intrusive methods of enforcement. As HEW Secretary Weinberger testified, when Congress reviewed the Department's regulations in 1975 (*1975 Hearings*, *supra*, at 464-465):

> We chose [an approach] that requires the universities and colleges, first of all, to examine the law and the regulation and, second, to see if they are in compliance and keep the data to help in enforcement and help them answer charges or complaints that may be made by individuals and, third, to set up some kind of internal grievance procedure of their own so we can minimize the Federal enforcement effort and get the best kind of enforcement, which is voluntary compliance.
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> * * * * *
>
> [W]e believed voluntary enforcement and provisions that * * * direct the colleges to get enforcement of this kind o[n] their own are preferable to

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[51] See, *e.g.*, 7 C.F.R. 15.4 (DOA); 14 C.F.R. 1250.104 (NASA); 22 C.F.R. 141.4 (DOS); 22 C.F.R. 209.5 (AID); 29 C.F.R. 31.6 (DOL); 38 C.F.R. 18.4 (VA); 40 C.F.R. 7.6 (EPA); 45 C.F.R. 611.4 (NSF); 49 C.F.R. 21.7 (DOT).

setting up a large Government police force to go in and gather its own data and do its own rather rigid enforcement.

2. Petitioners' contention that the Department may terminate assistance only after a finding of actual discrimination has no basis in the language of Section 902, which authorizes termination to effect "[c]ompliance with *any* requirement adopted pursuant to this section" (emphasis added). It would, moreover, completely frustrate the regulations' emphasis on voluntary compliance. Recipient institutions could simply ignore the demands of the statute and gamble that the inadequacy of enforcement resources would insulate them from sanctions. They could fail to establish the grievance procedure required by 34 C.F.R. 106.8. They could also—without fear of termination—withhold from the Department the information necessary for it to establish a violation.[52]

It is true (see Pet. Br. 42-43, 47) that termination of assistance should be a remedy of last resort. It is also important that recipients be afforded procedural safeguards, such as the public hearing provided by Section 902, before termination is effected (see Pet. App. Br. 45). But the Department in this case attempted to secure voluntary compliance with the assurance regulation on five different occasions (Tr. 33) before initiating enforcement proceedings. A hearing was then held, and an express finding made on the record that Grove City had failed to comply with the regulation. At the hearing Grove City had the opportunity to contest its coverage under Title IX, and it is now exercising its right to appeal the adverse determination of that issue. It cannot seriously be argued that the hearing process here was a "meaningless formality" (Pet. Br. 45).[53]

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[52] 34 C.F.R. 106.71 adopts certain Title VI regulations, including one that requires a recipient to keep records and provide access to records by Department officials involved in an investigation. 34 C.F.R. 100.6.

[53] Petitioners' argument that termination punishes innocent students for no good reason (Br. 47) proves too much. It will always

Petitioners rely heavily on the legislative history of Title VI for their contention that termination is improper absent a showing of actual discrimination. They point (Pet. Br. 43-46) to statements by proponents of that title designed to allay fears about the harshness of the termination remedy. See, *e.g.*, 110 Cong. Rec. 6749 (1964) (remarks of Sen. Humphrey). But those statements, made before any agency rulemaking was undertaken, prove little. Their focus on the most obvious of the rulemaking powers granted by Title VI—the power to adopt substantive nondiscrimination requirements—implies no intention to deny agencies the usual authority to prescribe regulations necessary to carry out their enforcement functions.

Petitioners' discussion of Title VI omits to mention that identical regulations under that law were upheld several years before Title IX was adopted. Like Section 902 of Title IX, Section 602 of Title VI (42 U.S.C. 2000d-1) authorizes each agency administering federal financial assistance to promulgate implementing regulations and to effect "[c]ompliance" with any such "requirement" by termination of assistance. The Title VI counterpart of 34 C.F.R. 106.4 was promulgated the same year Title VI was enacted. 45 C.F.R. 80.4 (1964). In *Gardner* v. *Alabama*, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968), HEW terminated five separate federal assistance programs when Alabama refused to execute the required assurance. The court of appeals found the "procedure of submitting an assurance form to be particularly appropriate" as a monitoring and enforcement mechanism, and "clearly * * * within * * * [the] rule-making power conferred * * * by statute" (*id.* at 817 & n.8). Accordingly it concluded that "[s]ince Alabama is presently in a state of noncompliance with

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be the case that termination of assistance will affect students innocent of any wrongdoing. Yet Congress determined that such a remedy was appropriate in order to ensure that federal funds were not used to support discrimination.

this regulation, the validity of the order * * * terminating funds * * * must be upheld" (*id* at 817.).[54]

In any event, the issue in this case is not whether the 1964 Congress envisioned the adoption of an assurance-of-compliance regulation under Title VI. It is whether the 1972 Congress—acting after the Title VI regulation had been in effect for eight years and approved in *Gardner*—authorized a similar provision under Title IX. Petitioners point to no evidence in Title IX's legislative history suggesting the contrary. And Senator Bayh's introductory remarks emphasize that Congress understood the effect of its action. He stated (118 Cong. Rec. 5807 (1972)):

> Under this amendment, each Federal agency which extends Federal financial assistance is empowered to issue implementing rules and regulations effective after approval of the President. * * * Failure to comply with the regulations may result in the termination of funding.
>
> * * * * *
>
> The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

III. THE APPLICATION OF TITLE IX TO THE COLLEGE DOES NOT INFRINGE THE FIRST AMENDMENT RIGHTS OF THE COLLEGE OR ITS STUDENTS

Petitioners argue (Br. 47-50) that conditioning federal funding on compliance with Title IX's prohibition against sex discrimination infringes First Amendment rights of

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[54] See also *United States* v. *New Hampshire*, 539 F.2d 277 (1st Cir.), cert. denied, 429 U.S. 1023 (1976) (upholding reporting requirement as a valid enforcement mechanism under Title VII); *United States* v. *El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (HEW is entitled to considerable latitude to collect data needed to fulfill its regulatory tasks under Title VI). Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507-509 (1943).

the College and its students to academic freedom and freedom of association.[55]

This Court has recognized some limits on state regulation of wholly privately funded institutions;[56] but it is well established that the government may attach reasonable conditions to grants of federal financial assistance that educational institutions are free to refuse. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947); see *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983).[57] As the Court pointed out in *Norwood* v. *Harrison*, 413 U.S. 455, 462 (1973), "[I]t is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must * * * receive state aid." The College has every right to return to its former policy of abstinence, decline to certify BEOG applications for students, and thereby refrain from supplementing its financial aid budget with federal grants; there is therefore no need to consider whether an outright ban on sex discrimination would be an unconstitutional interference by the federal government with the College's right to

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[55] Although Grove City College is affiliated with the Presbyterian Church, petitioners do not contend that the College's refusal to assure compliance with Title IX is based upon any religious tenet.

[56] For example, a state may not prohibit an individual from obtaining a private education either by making public education compulsory, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), or by pervasive regulation of the private school which effectively denies its right to exist, *Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927).

[57] Contrary to petitioners' assertion (Br. 41 & note 41), the Title IX regulations do not become illegally ambiguous merely because they do not spell out which of Grove City's programs or activities is covered by Title IX. Unlike *Pennhurst State School & Hospital* v. *Halderman*, *supra*, in this case the statute and regulations clearly apply to all programs or activities receiving federal financial assistance.

academic freedom. Cf. *Runyon* v. *McCrary*, 427 U.S. 160, 175-179 (1976); *Norwood* v. *Harrison*, *supra*, 413 U.S. at 461-463.[58] Similarly, students are free to take their federal grants to a school that complies with Title IX or, by refusing federal assistance in financing their education, to attend Grove City College.[59] Thus, the First Amendment rights of the College and its students have in no way been infringed.

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[58] A decision of that question would require considerably more specific allegations of the nature of federal interference than petitioners have offered. Petitioners contend that "the Department asserts control over the College's day-to-day operations, threatening to destroy its autonomy and eliminate its unique characteristics" (Br. 47). But all that the Department has asserted in this case is that the College must sign Form 639 and comply with Title IX and its regulations insofar as they apply—*i.e.*, in the operation of the College's student financial aid program. It is unlikely that those duties would touch in any way upon the College's ability to maintain freedom of teaching, research, and publication. Nor is the requirement that the College not discriminate on the basis of sex inconsistent with the school's professed ideals. See Pet. Br. 48. Thus, it may be doubted whether this case—even if it involved straightforward regulation rather than conditions attached to federal assistance—would involve any substantial issue of institutional academic freedom. See Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817 (1983).

[59] See also *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 535-536 (E.D. N.C. 1977), *aff'd*, 435 U.S. 962 (1978).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

20 U.S.C. (Supp. V) § 1070a. Basic educational opportunity grants: amount and determinations; applications

(a) Pell grants; basic grant formula; reduction schedule; limitations; period of receipt of basic grants; noncredit and remedial courses

(1)(A) The Secretary shall, during the period beginning July 1, 1972, and ending September 30, 1985, pay to each eligible student (defined in accordance with section 1091 of this title) for each academic year during which that student is in attendance at an institution of higher education, as an undergraduate, a basic grant in the amount for which that student is eligible, as determined pursuant to paragraph (2).

(B) The purpose of this subpart is to provide a basic grant that (i) as determined under paragraph (2), will meet in academic year 1985-1986, 70 per centum of a student's cost of attendance not in excess of $3,700; and (ii) in combination with reasonable parental or independent student contribution and supplemented by the programs authorized under subparts 2 and 3 of this part, will meet 75 per centum of a student's cost of attendance, unless the institution determines that a greater amount of assistance would better serve the purposes of section 1070 of this title.

(C) Basic grants made under this subpart shall be known as "Pell Grants".

(2)(A)(i) The amount of the basic grant for a student eligible under this part shall be—

(I) $1,900 for academic year 1981-1982,
(II) $2,100 for academic year 1982-1983,
(III) $2,300 for academic year 1983-1984,

(IV) $2,500 for academic year 1984-1985, and
(V) $2,600 for academic year 1985-1986,

less an amount equal to the amount determined under section 1089 of this title to be the expected family contribution with respect to that student for that year.

* * * * *

(B)(i) The amount of a basic grant to which a student is entitled under this subpart for any academic year shall not exceed—

(I) 50 per centum of the cost of attendance (as defined under section 1089(d) of this title) at the institution at which the student is in attendance for that year, when the maximum grant is less than or equal to $1,900;

(II) 55 per centum of such cost of attendance when the maximum basic grant is more than $1,900 but is less than $2,100;

(III) 60 per centum of such cost of attendance when the maximum basic grant is at least $2,100 but is less than $2,300;

(IV) 65 per centum of such cost of attendance when the maximum basic grant is at least $2,300 but is less than $2,600; and

(V) 70 per centum of such cost of attendance when the maximum basic grant is $2,600.

(ii) No basic grant under this subpart shall exceed the difference between the expected family contribution for a student and the cost of attendance at the institution at which that student is in attendance. If with respect to any student, it is determined that the amount of a basic grant plus the amount of the expected family contribution for that student exceeds the cost of attendance for that year, the amount of the basic grant shall be reduced until the combination of expected family contribution and the amount of the basic grant does not exceed the cost of attendance at such institution.

(iii) No basic grant shall be awarded to a student under this subpart if the amount of that grant for that student as determined under this paragraph for any academic year is less than $200. Pursuant to criteria established by the Secretary by regulation, the institution of higher education at which a student is in attendance may award a basic grant of less than $200 upon a determination that the amount of the basic grant for that student is less than $200 because of the requirement of division (i) and that, due to exceptional circumstances, this reduced grant should be made in order to enable the student to benefit from postsecondary education.

(iv) Repealed. Pub. L. 96-374, title IV, § 402(c)(3), Oct. 3, 1980, 94 Stat. 1402

(3) The period during which a student may receive basic grants shall be the period required for the completion of the first undergraduate baccalaureate course of study being pursued by that student at the institution at which the student is in attendance. * * *

* * * * *

(b) Payments; insufficient available funds, entitlements; excess funds

(1) The Secretary shall from time to time set dates by which students must file applications for basic grants under this subpart.

(2) Each student desiring a basic grant for any year must file an application therefor containing such information and assurances as the Secretary may deem necessary to enable him to carry out his functions and responsibilities under this subpart.

(3)(A) Payments under this section shall be made in accordance with regulations promulgated by the Secretary for such purpose, in such manner as will best accomplish the purposes of this section.

* * * * *

(c) Agreements by institutions of higher education with Secretary to disburse amounts to students

Any institution of higher education which enters into an agreement with the Secretary to disburse to students attending that institution the amounts those students are eligible to receive under this subpart shall not be deemed, by virtue of such agreement, a contractor maintaining a system of records to accomplish a function of the Secretary.

(d), (e). Repealed. Pub. L. 96-374, title IV, § 402(h), Oct. 3, 1980, 94 Stat. 1404

APPENDIX B

Subpart A—Scope, Purpose and General Definitions

34 C.F.R. 690.1 Scope and purpose.

The Pell Grant Program awards grants to help financially needy students meet their costs of postsecondary education.

* * * * *

34 C.F.R. 690.3 Special terms.

(a) Eligible program: An undergraduate program of education or training which—

(1) Admits as regular students only persons who—

(i) Have a high school diploma.

(ii) Have a General Education Development Certificate (G.E.D.) or a State certificate received after passing a State-authorized examination which the State recognizes as the equivalent of a high school diploma, or

(iii) Are beyond the age of compulsory school attendance in the State in which the institution is located, and have the ability to benefit from the education or training offered; and

(2) (i) Leads to a bachelor, associate or undergraduate professional degree,

(ii) Is at least a two-year program which is acceptable for full credit toward a bachelor degree,

(iii) Is at least a 1 year program leading to a certificate or degree, which prepares students for gainful employment in a recognized occupation. (A 1-year program is defined in 34 CFR Part 668, Subpart A), or

(iv) Is, for a proprietary or postsecondary vocational institution, at least a six-month program leading to a certificate or degree, which prepares students for gainful employment in a recognized

occupation. (A six-month program is defined in 34 CFR Part 668, Subpart A).

* * * * *

(c) *Regular student*: A person who enrolls in an eligible program at an institution of higher education for the purpose of obtaining a degree or certificate.

* * * * *

34 C.F.R. 690.4 Eligible student.

(a) A student is eligible to receive a Pell Grant if the student—

(1) Is a regular student.

(2) Is enrolled as at least a half-time undergraduate student at an institution of higher education;

(3) Is enrolled in an eligible program as a regular student, as defined in § 690.3; and

(4) (i) Is a U.S. citizen or National, * * *

* * * * *

34 C.F.R. 690.5 Duration of student eligibility.

A student is eligible to receive a Pell Grant for the period of time required to complete the first undergraduate baccalaureate course of study being pursued by that student.

34 C.F.R. 690.6 Pell Grant payments from more than one institution.

A student will not be entitled to receive Pell Grant payments concurrently from more than one institution or from the Secretary and an institution.

34 C.F.R. 690.7 Institutional eligibility.

(a) (1) An institution of higher education is eligible to participate in the Pell Grant Program if it—

(i) Meets the appropriate definition set forth in 34 CFR 668, Subpart A,

(ii) Enters into a program participation agreement with the Secretary, and

(iii) Complies with that agreement and with the applicable provisions of 34 CFR Part 668 of this title, "Student Assistance General Provisions."

(2) If an institution becomes eligible during an award year, a student enrolled and attending that institution will be eligible to receive a Pell Grant for the payment period during which the institution became eligible and any subsequent payment period.

(b)(1) An institution of higher education becomes ineligible to participate in the Pell Grant Program if it no longer meets the applicable definition set forth in Part 668 of this title, or if its eligibility is terminated under the procedures set forth for terminating institutions in Part 668 of this title.

(2) If an institution becomes ineligible during an award year, an eligible student who was attending the institution and who submitted a valid SER to the institution, or to the Secretary if the institution participates under the Alternate Disbursement System (ADS), before the date the institution became ineligible, will be paid a Pell Grant for that award year for—

(i) The payment period that the student completed before the institution became ineligible, and

(ii) The payment period in which the institution became ineligible.

(c) An institution participating in the program under ADS which becomes ineligible must provide the Secretary with the name and enrollment status of each student who applied for and was determined eligible for a Pell Grant who was attending the institution when its eligibility was terminated.

(d) An institution participating in the program under the Regular Disbursement System which becomes ineligible must supply to the Secretary—

(1) The name and enrollment status of each eligible student who, during the award year, submitted a valid SER to the institution before it become ineligible.

(2) The amount of funds paid to each Pell Grant recipient for that award year.

(3) The amount due to each student eligible to receive a Pell Grant through the end of the payment period; and

(4) An accounting of the Pell Grant expenditures for that award year to the date of termination.

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Subpart E—Costs of Attendance

34 C.F.R. 690.51 Allowable costs of attendance—general.

(a) Except as provided in §§ 690.54-690.58, a student's cost of attendance means—

(1) The tuition and fees charged to a full-time undergraduate student for an academic year by the institution he or she is attending as determined under § 690.52;

(2) Room and board costs for an academic year as determined under § 690.53; and

(3) An allowance of $400 for books, supplies, and miscellaneous expenses for an academic year.

(b) An institution must be able to justify and document the cost of attendance figures established under this subpart.

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Subpart F—Determination of Pell Grant Awards

34 C.F.R. 690.61 Submission process and deadline for Student Eligibility Report (SER).

(a) (1) A student applies for a Pell Grant by submitting a valid "Student Eligibility Report" (SER) to his or her institution or to the Secretary, if that institution is participating in the Pell Grant Program under the Alternate Disbursement System (ADS).

(2) The SER is considered valid only if all information used in the calculation of the eligibility index is complete and accurate when the application was signed. Institutions are entitled to rely on SER information except under conditions set forth in § 690.77.

(b) Except as noted in § 690.77, to receive a Pell Grant, a student who enrolls before May 1 of an award year must submit the SER to his or her institution on or before May 31 of that award year.

A student who enrolls for the first time in the award year on or after May 1 of that award year may submit the SER to the institution on or before June 30 of that award year.

(c) A student attending an institution participating in the Pell Grant Program under the ADS has an additional ten days to submit the SER to the Secretary: June 10 for those who enroll before May 1, and July 10 for those who enroll on or after May 1.

(d) A student who submits an SER to an institution when he or she is no longer enrolled and eligible for payment at that institution may not be paid a Pell Grant.

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Subpart G—Administration of Grant Payments—Regular Disbursement System

34 C.F.R. 690.71 Scope.

This subpart deals with program administration by an institution of higher education that has entered into an agreement with the Secretary to calculate and pay Pell Grant awards.

34 C.F.R. 690.72 Institutional agreement—Regular Disbursement System (RDS).

(a) The Secretary may enter into an agreement with an institution of higher education under which the institution will calculate and pay Pell Grants to its students. The agreement will be on a standard form provided by the Secretary and will contain the necessary terms to carry out this part.

(b) The Secretary will send a Payment Schedule for each award year to an institution that has entered into an agreement under paragraph (a) of this section.

34 C.F.R. 690.73 Termination of agreement—Regular Disbursement System.

(a) Termination by the Secretary. The Secretary may terminate the agreement with an institution by giving—

(1) 30 days written notice; or

(2) Less than 30 days written notice if it is necessary to prevent the likelihood of a substantial loss of funds to the Federal government or to students.

(b) Information provided. The institution must provide the following information to the Secretary if the Secretary terminates the agreement:

(1) The name and enrollment status of each eligible student who submitted a valid SER to the institution before the termination date;

(2) The amount of funds the institution paid to Pell Grant recipients for the award year in which the agreement is terminated;

(3) The amount due to each student eligible to receive a Pell Grant through the end of the award year; and

(4) An accounting of Pell Grant expenditures to the date of termination.

(c) Termination by the institution. The institution may terminate the agreement by giving the Secretary written notice. The termination becomes effective on June 30 of that award year. The institution must carry out the agreement for the remainder of the award year.

(d) Termination because of a change in ownership which results in a change of control. The agreement automatically terminates when an institution changes ownership which results in a change of control. The Secretary will enter into an agreement with the new owner if the institution complies with requirements set forth in Subpart B of the Student Assistance General Provisions (34 CFR Part 668).

(e) If an agreement is terminated, the institution's eligibility as discussed in § 690.7 is not terminated but the Secretary will pay an institution's students ONLY if the institution enters into an ADS agreement (See § 690.92.).

34 C.F.R. 690.74 Advancement of funds to institutions.

The Secretary will advance funds for each award year, from time to time, to RDS institutions, based on his or her estimate of the institution's need for funds to pay Pell Grants to its students.

34 C.F.R. 690.75 Determination of eligibility for payment.

(a) An institution may pay a Pell Grant to a student only after it determines that the student—

(1) Meets the eligibility requirements set forth in § 690.4;

(2) Is maintaining satisfactory progress in his or her course of study;

(3) Is not in default on any National Defense/Direct Student Loan made by that institution or on any Guaranteed Student Loan or Parent Loan for Undergraduate Students (PLUS) received to meet the cost of attendance at that institution; and

(4) Does not owe a refund on a Pell Grant, a Supplemental Grant or a State Student Incentive Grant received to meet the cost of attending that institution.

(b)(1) Before making any payment to a student, the institution must confirm that he or she continues to meet the criteria set forth in paragraph (a) of this section.

(2) However, if an eligible student submits an SER to the institution and becomes ineligible before receiving a payment, the institution must pay the student only the amount which it determines could have been used for educational purposes before the student became ineligible.

(c) If an institution determines at the beginning of a payment period that a student is not maintaining satis-

factory progress, but reverses itself BEFORE the end of the payment period, the institution may pay a Pell Grant to the student for the entire payment period.

(d) If an institution determines at the beginning of a payment period that a student is not maintaining satisfactory progress, but reverses itself AFTER the end of the payment period, the institution may neither pay the student a Pell Grant for that payment period nor make adjustments in subsequent Pell Grant payments to compensate for the loss of aid for that period.

(e) Conditions under which students who are overpaid grants may continue to receive Pell Grants are [as] follows:

(1) Overpayment of a Pell Grant. If an institution makes an overpayment of a Pell Grant to a student, it may continue to make Pell Grant payments to that student if (i) the student is otherwise eligible; and (ii) it can eliminate the overpayment in the award year in which it occurred by adjusting the subsequent Pell Grant payments for that award year.

(2) Overpayment of a Pell Grant due to institutional error. In addition to the exception provided in paragraph (e)(1) of this section, if the institution makes an overpayment of Pell Grant to a student as a result of its own error, it may continue to make payments to that student if;

(i) The student is otherwise eligible, and

(ii) The student acknowledges in writing the amount of overpayment and agrees to repay it in a reasonable period of time.

(3) Overpayment on a Supplemental Grant. An institution may continue to make Pell Grant payments to a student who receives an overpayment on a Supplemental Grant if:

(i) The student is otherwise eligible, and

(ii) It can eliminate the overpayment by adjusting subsequent financial aid payments (other than Pell Grants) in the same award year in which it occurred.

(f) An institution, in determining whether a student is in default on a loan made under the Guaranteed Student Loan Program or the PLUS Program, may rely upon the student's written statement that he or she is not in default unless the institution has information to the contrary.

(g) Conditions under which students who are in default on loans made for attendance at that institution may receive Pell Grants are as follows:

(1) Guaranteed Student Loans and Parent Loans for Undergraduate Student (PLUS). An institution may pay a Pell Grant to a student who is in default on a Guaranteed Student Loan or a PLUS Loan if the Secretary (for federally insured loans) or a guarantee agency (for a loan insured by that guarantee agency) determines that the student has made satisfactory arrangements to repay the defaulted loan.

(2) National Defense/Direct Student Loan. An institution may pay a Pell Grant to a student who is in default on a National Defense/Direct Student Loan made at that institution, if the student has made arrangements, satisfactory to the institution, to repay the loan.

(3) The Secretary does not consider a loan made under the National Defense Student Loan, National Direct Student Loan, Guaranteed Student Loan, or Parent Loans for Undergraduate Students Program which is discharged in bankruptcy to be in default for purposes of this section.

(h) For purposes of this section, an overpayment of a grant means that a student received payment of a grant greater than the amount he or she was entitled to receive.

34 C.F.R. 690.76 Frequency of payment.

(a) In each payment period, an institution may pay a student at such times and in such installments as it determines will best meet the student's needs.

(b) Only one payment is required if a portion of an academic year occurring within one award year is less than three months.

(c) The institution may pay funds due a student for any completed period in one lump sum. The student's enrollment status will be determined according to work already completed.

34 C.F.R. 690.77 Verification of information on the SER—withholding of payments.

(a)(1) The Secretary may require that a student verify the information submitted on the application and included on the SER, by submitting appropriate documentation to the institution or to the Secretary.

(2) The Secretary may also require that the institution withhold payment of a student's grant until the institution or the Secretary determines that the student has supplied the correct information.

(b) If any institution believes that any information on the SER used in calculating the student's expected family contribution is inaccurate, or if the application is chosen by the Secretary for verification, the institution must request that the student verify the information on the SER.

(c) The Secretary will establish and publish—

(1) Procedures to be used in verifying information for selected students ("Validation Procedures"), and

(2) The conditions under which payments will be made for these students.

(d)(1) If a student makes a correction which results in a change in his or her expected family contribution, the student must submit the SER to the institution, and the institution must recalculate the student's award based on the verified SER. Any overpayment must be repaid by the student.

(2) If the documentation requested by the institution under this section does not verify the information on the SER, or if the student does not correct the SER, the institution must forward the student's name, social security number and other relevant information to the Secretary in accordance with the procedures referenced in paragraph (c) of this section.

(e) A student corrects an SER by--

(1) Providing accurate information on the SER;

(2) Getting the appropriate signatures on the SER; and

(3) Re-submitting the SER to the Secretary.

(f) If an institution has documentation which indicates that the information used to calculate the student's expected family contribution on the SER is inaccurate, it may not pay a Pell Grant for any award year until the student corrects the error or verifies the data.

(g) If an institution believes, but cannot document, that inaccuracies exist on the SER, it may not withhold payments unless authorized by the Secretary. These cases must be forwarded to the Secretary.

(h)(1) If the Secretary requests documentation, the student must comply within a time period set by the Secretary.

(2)(i) If the student provides the requested documentation on time, he or she will be eligible for Pell Grant payments based upon the verified SER.

(ii) If the verified SER is submitted to the institution after the appropriate deadline as specified in § 690.61, but within an established time period to be determined by the Secretary, the student may be paid only up to the amount withheld because of the verification process.

(3) If the student does not provide the requested documentation within the established time period—

(i) The student will forfeit the Pell Grant for the award year,

(ii) Any grant payments received must be returned to the Secretary, and

(iii) No further Pell Grant applications will be processed for that student until documentation has been provided or the Secretary decides there is no longer need for documentation.

34 C.F.R. 690.78 Method of disbursement—by check or credit to student's account.

(a) The institution may pay a student either directly by check or by crediting his or her account with the institution. The institution must notify the student of the amount of money he or she can expect to receive, and how he or she will be paid.

(b) (1) The institution may not make a payment to a student for a payment period until the student is registered for that period.

(2) The earliest an institution can directly pay a registered student is 10 days before the first day of classes of a payment period.

(3) The earliest an institution can credit a registered student's account is 3 weeks before the first day of classes of a payment period.

(c) The institution must return to the Pell Grant account any funds paid to a student who, before the first day of classes—

(1) Officially or unofficially withdraws, or

(2) Is expelled.

(d) (1) If an institution pays a student directly, it must notify him or her when it will pay the Pell Grant award.

(2) If a student does not pick up the check on time, the institution must keep that check for 15 days after the date the student's enrollment for that award year ends.

(3) If the student has not picked up the check at the end of the 15 day period, the institution may credit the student's account for any amount owed to it for the award year.

(4) A student forfeits the right to receive the proceeds of the check if he or she does not pick up the check by the end of the 15 day period.

(5) Notwithstanding paragraph (d) (4) of this section, the institution may, if it chooses, pay a student who did not pick up the check, through the next payment period.

34 C.F.R. 690.79 Educational purpose statement.

(a) An institution may not pay a Pell Grant unless the student files a statement of educational purpose with the institution in which the student declares that he or she will use Pell Grant funds solely for educational expenses connected with attendance at the institution.

(b) The Secretary considers the following statement as satisfying this requirement.

Statement of Educational Purpose

I declare that I will use any funds I receive under the Pell Grant program solely for expenses connected with attendance at

_____

(Name of Institution)

(Date) _____

(Signature) _____

34 C.F.R. 690.80 Recovery of overpayments.

(a)(1) The student is liable for any overpayment made to him or her.

(2) Also, the institution is liable for an overpayment it makes to a student if the regulations indicate that the payment should not have been made. The institution must restore those funds to the Pell Grant account even if it cannot collect the overpayment from the student.

(b) If an institution makes an overpayment for which it is not liable, it must help the Secretary recover the overpayment by—

(1) Making a reasonable effort to contact the student and recover the overpayment; and, [if] unsuccessful,

(2) Providing the Secretary with the student's name, social security number, amount of overpayment, and other relevant information.

34 C.F.R. 690.81 Recalculation of a Pell Grant award.

(a) Change in expected family contribution. (1) If the student's expected family contribution changes the institution must recalculate the Pell Grant Award.

(2) Except as provided in § 690.77(h)(ii), the institution must adjust the award and pay the student the amount he or she is entitled to for the award year if the expected family contribution is recalculated because of—

(i) A clerical or arithmetic error under § 690.15, or

(ii) Extraordinary circumstances which affect the expected family contribution under § 690.39 and § 690.48.

(3) If a student's expected family contribution is recalculated because of a correction of the information requested under § 690.12 or § 690.77, the student's Pell Grant for the award year must be adjusted. Where possible, the adjustment must be made within the same award year.

(4) If the recalculation takes place in a subsequent award year, the student will be

(i) Eligible to receive payment unless prohibited under the provisions of § 690.77(h) and

(ii) Required to return any overpayment at the time of recalculation.

(b) Change in enrollment status.

(1) If an institution decides that a student's enrollment status has changed during a payment period, it may (but is not required to) establish a policy under which the student's award may be recalculated.

(2) If such a policy is established, it must apply to all students.

(3) If a student's award is recalculated, the institution determines the total amount the student is entitled to for the entire payment period by taking into account—

(i) The portion of the payment period at the original enrollment status;

(ii) The portion of the payment period at the new enrollment status; and

(iii) Any change in the student's cost of attendance.

34 C.F.R. 690.82 Fiscal control and fund accounting procedures.

(a)(1)(i) An institution must receive and process all Pell Grant funds through one identifiable bank account.

(ii) This account may be an existing one (preferably one maintained for Federal funds) if the institution maintains adequate accounting records to account for the Pell Grants funds separately from the other funds in that account.

(iii) At no time may the Pell Grant funds in this bank account be less than the balance indicated in the institution's accounting records for these funds.

(2) The institution must account for the receipt and expenditure of Pell Grant funds in accordance with generally accepted accounting principles.

(b) A separate bank account for Pell Grant funds is not required. However, the institution must notify any bank in which it deposits Pell Grant funds of all accounts in that bank in which it deposits Federal funds. This notice can be given by either:

(i) Including in the name of the account the fact that Federal funds are deposited therein; or

(ii) Sending a letter to the bank listing the accounts in which Federal funds will be deposited. A copy of this letter must be retained in the institution's files.

(c) Except for funds received under § 690.10, funds received by an institution under this part are held in trust for the intended student beneficiaries and may not be used or hypothecated for any other purpose.

34 C.F.R. 690.83 Maintenance and retention of records.

(a) Each institution must maintain adequate records which include the fiscal and accounting records that are required under § 690.82 and records indicating—

(1) The eligibility of all enrolled students who have submitted a valid SER to the institution;

(2) The name, social security number, and amount paid to each recipient;

(3) The amount and date of each payment;

(4) The amount and date of any overpayment that has been restored to the program account;

(5) The "Student Eligibility Report" for each student;

(6) The student's cost of attendance;

(7) How the student's full or part-time enrollment status was determined; and

(8) The student's enrollment period.

(b)(1) The institution must make the records listed in paragraph (a) available for inspection by the Secretary's authorized representative at any reasonable time in the institution's offices. It must keep these records for five years after it submits an accounting of each award year's funds to the Secretary.

(2) An accounting of each award year's funds occurs when the institution submits to the Secretary the June 30 Progress Report for that award year. The June 30 Progress Report (ED Form 255-3) is the report on which an institution reports to the Secretary the total amount of money it has expended in the Pell Grant Program during an award year and the total number of Pell Grant recipients at that institution during that award year.

(c) The institution must keep records involved in any claim or expenditure questioned by Federal audit until resolution of any audit questions.

(d) An institution may substitute microfilm copies in lieu of original records in meeting the requirements of this section.

34 C.F.R. 690.84 Submission of reports.

The institution must submit the reports and information the Secretary requires in connection with the funds advanced to it and must comply with the procedures the Secretary finds necessary to ensure that the reports are correct.

34 C.F.R. 690.85 Audit and examination.

(a) Federal audits. The institution must give the Secretary, the Comptroller General of the United States, or

their duly authorized representatives, access to the records specified in § 690.82 and § 690.83 and to any other pertinent books, documents, papers, and records.

(b) Non-Federal audits. The institution must audit or have audited under its direction all Pell Grant Program transactions to determine at a minimum—

(1) The fiscal integrity of financial transactions and reports; and

(2) If such transactions are in compliance with the applicable laws and regulations. Such audits will be performed in accordance with the Department of Education's "Audit Guide" for the Pell Grant Program.

(3) The institution must have an audit performed at least once every two years.

(c) The institution must submit audit reports to the institution's local regional office of the Department of Education's Audit Agency. It must give the Audit Agency and the Secretary access to records or other documents necessary to the audit's review.

Subpart H—Administration of Grant Payments—Alternate Disbursement System

34 C.F.R. 690.91 Scope.

This subpart deals with program administration by an institution of higher education under the Alternate Disbursement System (ADS). Under the ADS, the Secretary calculates and pays the Pell Grant awards.

34 C.F.R. 690.92 Institutional agreement—Alternate Disbursement System (ADS).

(a) Under ADS, the Secretary will calculate and pay Pell Grant awards to students enrolled in an institution which has entered into an agreement to carry out this subpart.

(b) Under this agreement, the institution agrees to:

(1) Complete ED Form 304 for each eligible student as specified in § 690.94; and

(2) Maintain and keep records as specified in § 690.96.

34 C.F.R. 690.93 Change in ownership and change to the Regular Disbursement System (RDS).

(a) Change to RDS. The Secretary may enter into an agreement with an ADS institution which wishes to participate in the program under the Regular Disbursement System. However, the agreement will go into effect July 1 of the succeeding award year.

(b) Termination because of a change in ownership that results in a change in control.

(1) An ADS agreement terminates when an institution changes ownership that results in a change in control.

(2) The Secretary may enter into an agreement with the new owner if the institution complies with the requirements set forth in Subpart B of the Student Assistance General Provisions (34 CFR Part 668).

34 C.F.R. 690.94 Calculation and disbursement of awards by the Secretary of Education.

(a) An eligible student enrolled in an institution participating in the Pell Grant Program under the ADS applies to the Secretary for a Pell Grant according to the following procedures:

(1) The student submits an SER to his or her institution and obtains an ED Form 304 from the institution;

(2) The student completes the ED Form 304, including the statement of educational purpose described in § 690.79, and submits it to the institution;

(3) On the ED Form 304 the institution certifies that the student—

(i) Meets eligibility requirements of § 690.4,

(ii) Is maintaining satisfactory progress in his or her course of study,

(iii) Does not owe a refund on grants received for attendance at that institution under the Pell Grant, the Supplemental Grant, or the State Student Incentive Grant Programs, and

(iv) Is not in default on any National Defense/Direct Student Loan made by the institution or on any Guaranteed Student Loan received for attendance at that institution. (In determining whether a student is in default on a GSL, the institution may rely on a written statement provided by the student unless the institution has information to the contrary); and

(4) The institution returns the SER and ED Form 304 to the student, who then submits these documents to the Secretary. Both documents must be received by the Secretary on or before the deadline dates described in § 690.61.

(b) If an institution believes that the information on an SER may be in error, the institution must notify the student and request documentation or correction. Any case not resolved by the institution should be reported to the Secretary.

(c) The Secretary will calculate a student's award in accordance with Subpart F of this part and will pay the student once every payment period.

34 C.F.R. 690.95 Termination of enrollment and refund.

(a) The institution must inform the Secretary of the date when a student officially or unofficially withdraws or is expelled during a payment period for which that student was paid.

(b) A student who officially or unofficially withdraws or is expelled from an institution before completion of 50 percent of a payment period for which he or she has been paid, will refund a prorated portion of the payment as determined by the Secretary.

34 C.F.R. 690.96 Maintenance and retention of records.

(a) An institution under the ADS must establish and maintain for each award year—

(1) Records relating to each Pell Grant recipient's enrollment status, and attendance costs at the institution; and

(2) Records showing when each recipient was enrolled.

(b) The institution must make these records available at the geographic location where the student will receive his or her degree or certificate of course completion, and must keep them for five years from the end of the award year.

(c) The institution will make available to the Secretary, the Comptroller General of the United States, and their authorized representatives, pertinent books, documents, papers, and records for audit and examination during the five year retention period.

(d) An institution may substitute microfilm copies in lieu of original records in meeting the requirements of this section.

APPENDIX C

STATEMENTS BY MEMBERS OF CONGRESS

1. *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, et al. Before the Special Comm. on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess., Pt. 1, 480 (1971) (remarks of Rep. Erlenborn)

2. 117 Cong. Rec. 37787 (1971) (remarks of Rep. Scheuer)

3. 118 Cong. Rec. 6007 (1972) (statement of Sen. Randolph summarizing the report of a study by the Appalachian Regional Commission)

4. S. Rep. No. 94-882, 94th Cong., 2d Sess. 10 (1976)

5. *Oversight Hearings on All Forms of Federal Student Financial Assistance: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 3 (1977) (statement of Chairman Ford)

6. *Higher Education Amendments of 1979: Hearings on S. 1839 Before the Subcomm. on Education, Arts and the Humanities of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., Pt. 2, 278, 312, 313 (statements of Sens. Stafford, Javits, and Pell)

7. *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 181-182, 218, 448 (statements of Chairman Ford)

8. *Id.* at 450 (remarks of Rep. Ashbrook)

STATEMENTS BY INSTITUTIONS

1. *Education Amendments of 1971: Hearings on S. 659 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., Pt. 3, 1506 (1971) (testimony of Dr. Edgar Carlson, Executive Director, Minnesota Private College Council)

2. *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, et al. Before the Spe-*

cial Subcomm. on Education of the House Comm. on Education and Labor, 92d Cong., 1st Sess., Pt. 1, 151, 162 (1971) (report entitled *The Red and the Black* on the Financial Status, Present and Projected, of Private Institutions of Higher Learning presented by the Association of American Colleges. Using data based upon a survey of 72% of all private 4 year accredited colleges and universities, the report states that "grants directly to students" were the third most frequently preferred type of federal aid, following facilities grants and institutional grants.)

3. *Id.* at 231 (testimony of Dr. Jack E. Brookins, President, Southwestern Oregon Community College)

4. 117 Cong. Rec. 37805 (1971) (statement of Dr. Alice Rivlin, senior fellow, Brookings Institution, reprinted in the Record by Rep. Steiger)

5. *Higher Education Act Amendments of 1976: Hearings on H.R. 3470 and Related Proposals to Amend the Higher Education Act of 1965, as Amended Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st & 2d Sess's. 599-604 (1975 and 1976) (statement of Dr. Howard Bowen on behalf of the Association of American Colleges and the National Council on Independent Colleges and Universities)

6. *Id.* at 584 (1975) (statement by Miles M. Fisher IV on behalf of the National Association For Equal Opportunity In Higher Education)

7. *Oversight Hearings on All Forms of Federal Student Financial Assistance: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 624-625 (1977) (statement of Dr. Reginald Wilson, President, Wayne County Community College, on behalf of the Association of Community and Junior Colleges)

8. *Middle Income Student Assistance Act: Hearings on H.R. 10854 Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 141 (1978) (statement of Margaret

Gordon, Carnegie Council on Policy Studies in Higher Education)

9. *Higher Education Amendments of 1979: Hearings on S. 1839 Before the Subcomm. on Education, Arts, and the Humanities of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., Pt. 2, 320 (1979) (statement of David M. Irwin, representing the State Association Executive Council of the National Association of Independent Colleges and Universities)

10. *Id.* at 614-615, 620 (statement of Dr. Carl Kaysen, Sloan Commission on Government and Higher Education)

11. *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 253 (1979) (testimony of Richard Ramsden, Vice President, Administration and Finance, Brown University)

12. *Id.* at 422-423 (statement of Alfred B. Bonds, President, Baldwin-Wallace College)

13. *Id.* at 442-443 (statement of Dr. L. Guy Nees, President, Mount Vernon Nazarene College)

14. *Id.* at 531-532 (statement of Paul M. Orehovec, Director of Financial Aid, College of Wooster)

15. *Id.* at 539-540 (statement of Gary Rothman, Director of Student Financial Aid, Mount Vernon Nazarene College)

STATEMENTS BY HEW OFFICIALS

1. *Higher Education Act Amendments of 1976: Hearings on H.R. 3470 and Related Proposals to Amend the Higher Education Act of 1965, as Amended Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st & 2d Sess's. 799-801 (1976) (testimony of Virginia Trotter, Assistant Secretary for Education, HEW, and Virginia Smith, Office of Education, HEW)

2. *Middle Income Student Assistance Act: Hearings on H.R. 10854 Before the Subcomm. on Postsecondary*

Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. 222-223 (1978) (testimony of Commissioner of Education Ernest Boyer)

3. *Reauthorization of the Higher Education Act and Related Measures: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess., Pt. 3, 43-45, 52, 64-65 (1979) (statement of Michael O'Keefe, HEW)

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No. 82-792

In the Supreme Court of the United States

OCTOBER TERM, 1983

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, ET AL., PETITIONERS

v.

TERREL H. BELL, SECRETARY OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

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Pursuant to Rule 35.6 of the Rules of this Court, the Solicitor General, on behalf of the federal respondents, moves for leave to file the annexed post-argument memorandum.

This case was argued on November 29, 1983. At the oral argument, numerous questions were addressed from the Bench to both counsel. The government is concerned by the fact that some of these questions may indicate uncertainty on the part of the Court with respect to the actual nature of the statutory scheme created by Congress for the distribution of Basic Educational Opportunity Grants and with respect to the status of the two different distribution systems currently in use for those grants. We hope in this memorandum to dispel any possible confusion created by the failure of counsel to clarify this matter at oral argument.

We are also concerned about indications from questions from the Bench that there may be uncertainty whether the government's position on how to define the relevant "program or activity" in this case is consistent with the government's approach to that question in the case argued immediately after this case, *Consolidated Rail Corp.* v. *Darrone*, No. 82-862. We seek to dispel any confusion that may exist with a few brief comments in this memorandum.

Respectfully submitted.

PAUL M. BATOR
*Acting Solicitor General**

DECEMBER 1983

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*The Solicitor General has recused himself from further participation in this case.

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POST-ARGUMENT MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. Questions directed to counsel at oral argument of this case — together with possible intimations drawn from some expressions used by counsel for petitioners — have generated a concern on the part of the government that there may exist some misunderstanding as to the statutory scheme created by Congress with respect to the distribution of Basic Educational Opportunity Grants (BEOGs) — the grants whose characterization, for purposes of Title IX, is at issue in this case. We are particularly concerned by the suggestion — perhaps implied in some questions from the Bench and in some of petitioners' counsel's remarks — that *Congress* could not have regarded BEOGs as "Federal financial assistance" to a college because *it* provided that the funds could be distributed, not to the college, but directly to students through an Alternate Disbursement System (ADS) rather than the Regular Disbursement System (RDS).

2. We think it important for this case that it be understood that the ADS system — under which Grove City students apply directly to the Secretary for BEOGs, and the Secretary (after certification by Grove City) calculates the awards and sends them directly to the students — was *not* created by Congress and is *not* in any way required or affirmatively contemplated by the statute. The forerunner of the current ADS system was created in 1974 by the Secretary — two years after the passage of Title IX — in part as an accommodation to schools, like Grove City, that did not wish to be heavily embroiled in the administration of the program. See 39 Fed. Reg. 9995 (1974) (proposed regulations); 39 Fed. Reg. 41800 (1974) (final regulations).[1] The vast majority of schools involved in the BEOG program *themselves* receive and distribute BEOG funds to eligible students under the RDS system. Whether to administer the program through one system or the other, or to give colleges a choice between the two, is a matter entirely within the administrative discretion of the Secretary. 20 U.S.C. (Supp. V) 1070a(b)(3)(A). The statute in no way specifies the administrative mechanism to be used in distributing these funds and leaves that matter to regulations to be issued by the Secretary. It is thus misleading to think of Congress as having *legislated* in contemplation of a bifurcated distribution system — with some schools on the ADS system and some on the RDS system.

3. The assumption that a school "receives" federal financial assistance if it is on the RDS system but not if it is on the ADS system must, therefore, be analyzed in light of the fact that it would make the applicability of Title IX wholly

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[1]Another, and perhaps more important, purpose for adopting the ADS system was the Department's perception that some schools "were not capable [of] properly administering the disbursement of [BEOG] funds under the Regular Disbursement System." 43 Fed. Reg. 20925 (1978).

subject to the administrative discretion of the Secretary. If the Secretary were to abolish the ADS system tomorrow —as he clearly could — then, on that assumption, Grove City would either have to acknowledge the application of Title IX or would have to reject all BEOG funds. Per contra, that assumption also implies that the Secretary could render Title IX inapplicable to the entire BEOG program by the simple administrative device of making the ADS system the sole system for distributing the funds.

4. We are also concerned about intimations at argument that members of the Court may believe the government is taking inconsistent positions concerning what program "receives" federal financial assistance -- a question that clearly concerned the Court not only in this case but also in the case argued immediately in its wake. *Consolidated Rail Corporation* v. *Darrone*, No. 82-862 (argued Nov. 29, 1983). The government's position is that if the government gives an institution a truly *unrestricted* grant, and the terms of the grant permit it to be used for any purpose whatever, presumptively the entire institution is the relevant "program." Cf. 20 U.S.C. (Supp. V) 1051 *et seq*. By contrast, when the government gives an institution BEOGs (to hand out under the RDS system), those funds are *restricted* in the sense that the school must use them for scholarships — that is, for recruiting students regardless of means. The funds are intended to be, and have the economic effect of providing, a subsidy to Grove City's financial aid and scholarship program. (The situation is no different when BEOGs are handed out under the ADS system. The funds are again used for the purpose of recruiting to the school the most desirable students; the government simply relieves the school of the administrative burden of dispensing the money.) It is a form of double-counting to follow the funds further, and say that any activities for which the student

beneficiary pays are *also* federally assisted.[2] By specifying that the obligations imposed in Title IX were to be program-specific (20 U.S.C. 1681(a)), Congress intended the federal government not to follow the ripple effects of federal money as far as the funds could be traced. What it demanded, instead, was that the federal obligation a school incurred should be confined to the specific program that federal funds were intended to assist. In this case the government has provided money designed to aid Grove City in its ability to admit impecunious students, and the assisted program is the College's scholarship and financial aid program.

For the foregoing reasons and the additional reasons stated in our principal brief and at oral argument, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL M. BATOR
Acting Solicitor General

DECEMBER 1983

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[2]The monies students (including BEOG-funded students) pay to Grove City as tuition constitute operating revenues, but it is a mistake to think of them as "unrestricted" in the same sense as an unearmarked general gift to Grove City. These funds are obligated funds, because a school must provide specific educational services with them — instruction, meals, dormitory space, and books.

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No. 82-702

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T.H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Summary of Argument

This case is not an attack on Title IX or on non-discrimination principles generally. Rather, Grove City College is challenging the Department's[1] extraordinary expansion of Title IX in ways not authorized nor contemplated by Congress.

Upholding Grove City's position — that it may exist independent of government regulation if it chooses not to accept

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[1] As in previous briefs, "Department" refers to both the Department of Education and its predecessor, the Department of Health, Education & Welfare.

any loans or grants from either the state or federal government — is essential to preserve the distinction Congress drew when it enacted Title IX. If a college accepts state or federal funds, it can anticipate government regulation. If it refuses to participate in federal programs, then it can expect to be free from unwarranted regulatory intrusion. Grove City's challenge raises fundamental questions of governmental limitations, Congressional intent, and educational policy.

Contrary to the claims of some amici, the future of the government's non-discrimination policy does not depend on the outcome of this case. Indeed, it is only by accident that this issue arises in the context of a non-discrimination statute. Grove City supports the aims of Title IX, but strongly objects to the Department's assertion that one student's receipt of a single federal dollar subjects the College to regulatory control. The College values its autonomy and independence. It believes that its ability to offer high quality education, to operate efficiently, and ultimately, to remain independent will be threatened if it concedes that aid to a student equals aid to the institution. In enacting Title IX, Congress recognized that the very few colleges willing and able to operate as Grove City operates should have the opportunity to avoid regulation without depriving needy students of the opportunity to attend such institutions. Grove City seeks only to preserve the limits already encompassed in the statute, limits that the Department is improperly attempting to expand.

When Grove City was confronted with the Department's threat to its autonomy, it raised two core objections to the broad assertion of regulatory jurisdiction contained in the Department's Assurance of Compliance (A 124). The College first asserted that it did not receive federal financial assistance and hence was not subject to Title IX jurisdiction. Alternatively, it argued that because Title IX must be interpreted in a program-specific manner, the Department's attempt to impose institution-wide obligations upon it was contrary to the

statute's requirement of program-specificity recognized by this Court in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

If this Court determines that Grove City is not a recipient of federal financial assistance, then it will be unnecessary to decide the breadth of coverage under Title IX. If, however, this Court concludes that the College is a recipient of federal financial assistance, it will need to determine the extent to which the College is to be regulated, i.e., what Congress meant by "program or activity."

Until this point in the case, the government has maintained that such a determination was not necessary. However, in its brief on the merits to this Court, the government has finally agreed that if its interpretation of recipient is adopted, this Court must decide what "program or activity" means.

More significantly, the government has now also tried to modify its interpretation of Title IX and to disavow the institution-wide interpretation of Title IX long advanced by the Department and adopted by the Third Circuit in this case. The government admits that heretofore the Department "gave a more expansive view of the scope of the Title IX regulations than is now justified . . ." (Govt. Br. at 42). This confession of error itself requires reversal of the Third Circuit's judgment, which took an institution-wide view of Title IX and terminated students' funds solely because Grove City refused to sign an Assurance which was institution-wide in scope. The government now advances the extraordinary proposition that even though Grove City correctly challenged the Assurance's overbreadth, its students nonetheless should suffer termination of their individual grants because a revised, retroactive "correct" interpretation can save the Assurance and thus the funds-termination penalty imposed on the College and its students. This Catch-22 reasoning completely ignores logic and fairness.

But, even if the government could be permitted to make this eleventh hour revision, its new interpretation of Title IX is little better than the old. Disavowing its prior institution-wide approach, the government argues that only Grove City's financial aid program is subject to Title IX regulation, despite the fact that neither that program nor any other program at the College receives federal monies, chooses students who receive federal assistance, or determines amounts of federal awards. Because students *may* spend their federal grants at the College, the government claims that the College's financial aid program is "assisted" by federal funds.

While pretending loyalty to the statute's program-specific requirement, this argument is still another attempt to urge that Congress should not have rejected the institution-wide approach to Title IX. *See* Pet. Br. at 22-23; *North Haven Board of Education v. Bell*, 456 U.S. 512, 537-38 (1982). In all respects, however, the new argument remains a strained interpretation of statutory language which is supported by neither the text, nor the legislative history, nor the purposes of the student aid program at issue here.

Grove City does not seek to overturn the original conception of Title IX nor to limit its enforcement. Title IX does not authorize regulation of a college solely because some of its students receive individual federal grants. Nor does Title IX authorize termination of those grants where the institution which the students attend has never even been accused of discrimination. The Department has erroneously tried to overreach here. Grove City is attempting to operate without government support, in a cost effective manner, offering high quality programs, without discriminating in any way. Congress did not intend to threaten Grove City's ability to operate in the manner it does; this Court should, therefore, make certain that the Department is not permitted to regulate this College in violation of the limits contained in Title IX.

Argument

POINT I

Grove City conducts no program or activity receiving federal financial assistance.

Starting with Title IX's statutory language, as it must, the government's argument depends on the premise that Grove City's financial aid program is "assisted" by grants paid by the Department directly to students. Relying on *Bob Jones University v. Johnson*, 396 F. Supp. 597, 602 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975), the government contends that the statutory language requires only "assistance" to an educational program or activity for Title IX to apply. Govt. Br. at 12-13. While this interpretation would have merit if Congress had enacted language that prohibited discrimination in any program or activity "benefited or assisted" by the federal government, Congress required that the program or activity *receive* federal financial assistance before Title IX would apply.

Congress rejected language that would have allowed indirect, attenuated "assistance" to bring an educational institution within the scope of Title IX. The concept of jurisdiction hinging upon "assistance," a reformulation of the benefit theory (*See* Pet. Br. at 16, n. 15), would lead to Title IX coverage over all programs or activities at every educational institution in the country, as all may be said to be "assisted" by federal dollars, however indirectly. Opponents of Title IX's model, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* ("Title VI"), focused on this potentially expansive reading of "receiving Federal financial assistance" in their attempt to defeat Title VI. *See* 110 Cong. Rec. 9084 (1964) (Sen. Gore); 3 R. Cappalli, *Federal Grants & Cooperative Agreements* §19:36 (1982). The sponsors of Title VI argued in defense of the statutory language that the phrase "receiving Federal financial assistance" was to be interpreted

more narrowly; a recipient was defined as "the person or entity to whom a federal grant or loan is made, or with whom a federal assistance contract is entered into." *See* Letter from Attorney General Robert Kennedy to Senator John Sherman Cooper (April 29, 1964), 110 Cong. Rec. 10076 (1964). The Attorney General's statement confirms that Title VI was transformed from a statute encompassing "direct and indirect" assistance to one requiring direct receipt of assistance by a program or activity. *See* Pet. Br. at 29-30. Since the authors of Title IX deliberately adopted the language of Title VI and incorporated its standards, the same definitions of receiving federal financial assistance should be used when interpreting Title IX. *See* Pet. Br. at 28.

Grove City's programs or activities receive no federal assistance. The government grants at issue here are made directly to students. Further, Grove City has not consented to any relationship with the government which would constitute a federal assistance contract.

On the contrary, Grove City consistently refused to participate in the BEOG program, but, at the specific request of the Department, consented to maintain for the convenience of the government those forms necessary for students to seek federal grants directly from the Department. (JA 30).[2] Students chosen by the federal government to receive federal grants receive their checks directly from the government under the Alternate Disbursement System, a system devised to provide institutions like Grove City with a means to avoid federal entanglement. Students can use these grants for any educational expenses, not necessarily for charges levied by the College.

Faced with these facts, the government relies on an economic benefit argument to try to bring Grove City within the reach of

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[2]First-year or prospective students receive forms from other sources.

Title IX. It argues that all student assistance, however administered, has the effect of a subsidy for educational institutions. While correctly perceiving that any government entitlement program necessarily has economic effects beyond those direct beneficiaries of the program, this argument ignores the structure of the BEOG program and the deliberate choice Congress made to create *student* assistance, as opposed to institutional assistance.[3] Student assistance funds need not even be spent at an educational institution. Under current regulations, up to $1,500 of a BEOG award may be spent with off-campus vendors for room, board, books, supplies, and "miscellaneous expenses." *See* 34 C.F.R. §§690.51, 690.53 (1982). The Court should therefore reject the misleading conclusion that BEOG awards automatically flow through the student to the educational institution, a position which would change the status of the student to an intermediate financial conduit rather than the intended beneficiary of the grant.[4] In

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[3]The fact that BEOG awards are limited by the costs of the institution a student chooses to attend fails to prove that BEOGs were intended as assistance to that institution's financial aid program. Rather, because BEOGs are designed to foster students' free choice and are treated "as an individual matter" (Pet. Br. at 27), the "cost of attendance" regulations upon which the government relies are designed to reflect the sensible policy that the government should give students no more than is necessary for them to attend the college of their choice.

[4]The government emphasizes Grove City's acknowledgement that assistance that is "extended" through another recipient to an educational program or activity is within the scope of Title IX coverage. (Govt. Br. at 12-13). It further contends that no distinction can be drawn between funds which are passed on to intended beneficiaries by a state agency or educational institution and funds that may be spent by students who receive direct federal grants. *(Id).* Together with the clear common sense distinction that can be drawn between these two routes by which government funds can be traced to a college or university, a principled legal distinction can be made between the two situations — a distinction which Congress drew. In a

Footnote continued on next page—

fact, given the small amount of the typical BEOG award[5] and the spending discretion allowed individual BEOG recipients, many BEOG awards never find their way into college treasuries.

Even if an award does reach a college like Grove City, it does so only through a market exchange for educational services. It strains reason to equate that exchange, as the government does, with direct grants to the educational institution. The transaction that takes place when students exchange their dollars, however obtained, for tuition or institutional services is far different from the transaction that occurs when the government

—*Footnote continued from preceding page*

financial aid program such as the BEOG, students are the ultimate beneficiaries of the federal assistance. Under Title VI, the model for Title IX, Congress did not intend to regulate the activities of individual beneficiaries (Pet. Br. at 29-31). It thus distinguished between beneficiaries and intermediate recipients, entities with control over the expenditure or distribution of federal funds. Titles VI and IX clearly contemplated application of their provisions to aid distributed by an intermediate recipient (i.e., a state program) to institutional recipients or individual beneficiaries. In that sense, 34 C.F.R. §106.2(h) (1982), regulating federal financial assistance extended through a recipient to an educational program or activity, is consistent with the language of Title IX. The regulation is inconsistent with the statute, however, to the extent that it equates the individual beneficiary of federal assistance (here the students) with an intermediate recipient for the purposes of applying Title IX to expenditures of federal grants by beneficiaries. Under Title VI regulations, such an equation cannot be made because the definition of "recipient" excludes the "ultimate beneficiary under any program." *See* 34 C.F.R. §100.13(i)(1982). Title IX regulations generally duplicate the Title VI regulations' definition of recipient except that the phrase "excluding ultimate beneficiaries" is eliminated. Compare *Id*, with 34 C.F.R. §106.2(h)(1982). Failure to exclude ultimate beneficiaries from the definition of "recipient" renders the Title IX regulation fatally inconsistent with Congressional intent. *See* Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,' " 78 *Mich.L.Rev.* 608, 615-17 (1980).

[5]The BEOG awards at issue here are $408.00 for Petitioner Sickafuse and $654.00 for Petitioner Hockenberry. (JA 62-63).

gives an institution funds to build a chemistry building.[6] When students pay for tuition or college charges, value is exchanged for value. Any benefit derived by the institution is indirect and tangential, identical to that derived through the attendance at the institution by anyone supported by welfare, social security, or other government entitlement payments.[7]

Nor, as the government contends (Govt. Br. at 18), can direct grants to students be viewed as a subsidy for the College's financial aid program. The legislative history demonstrates the contrary. (Pet. Br. at 26). Congress created the separate, federal BEOG program to complement existing private scholarships, not to supplant them. When the Education Amendments of 1972 were enacted, colleges whose students received the grants were required to maintain their level of scholarship funding. *See* 20 U.S.C. §1088(c).[8] Thus, institutional funds were not to be released for other uses, but students were to receive the benefits of an additional, separate, federal scholarship program.

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[6]When an institution itself agrees to administer a federal assistance program, a transaction of a third kind is created and the incidental economic benefit to that institution (or a state or local agency filling that role) is irrelevant. It is subject to Title IX regulation because it has agreed to conduct a program funded by federal dollars.

[7]Despite the government's equation of institutional assistance to student tuition payments, the fact is that the Title IX regulations exempt analogous market transactions from their definition of "Federal financial assistance." 34 C.F.R. §§106.2(g)(2) and (4)(1982). The Department regulations have thus correctly excluded market transactions other than students' use of direct federal grants. Similarly, Title IX has never been held to apply to procurement contracts where the federal government itself engages in market transactions. *Cf.* 110 Cong. Rec. 10076 (1964).

[8]This maintenance of effort provision was repealed in 1980. *See* P.L. 96-374.

When creating a student assistance program, Congress intended to preserve the distinction between federal assistance extended to individual beneficiaries through state agencies or private entities and federal assistance extended directly to individual beneficiaries. As in earlier federal student assistance programs, institutions could elect to participate in the program by administering and disbursing federal student assistance funds. When they so participate, they have the capacity to discriminate within the program. When students receive the assistance directly from the federal government, however, there is no action by any intermediary with any capacity to discriminate in the federal assistance program. Only the federal government has the power to discriminate in making these direct awards. Congress intended Title VI and Title IX to apply only where institutions had the power to discriminate in a federal program. Where they did not, no application was intended.

Congress intended that an educational institution's operation of federal student assistance programs that distribute and administer federal funds, such as campus-based student grant and loan programs, justifies the *quid pro quo* of Title IX regulation over those programs. An institution's control over the use of federal dollars constitutes the permissible basis for regulation. Incidental benefit should not be an excuse for regulating truly private activities. Where a college, for entirely legitimate reasons, refuses to participate in a federal program, but the government nonetheless distributes grants to students who happen to attend that institution, the institution was not assigned the same status as one which voluntarily entered into

the assistance relationship with the government and which enjoys the ability to control assistance funds.[9]

POINT II

The government's interpretation of Title IX violates the statute's program-specific requirement.

Assuming, despite Grove City's argument to the contrary, that the College receives federal assistance through the BEOG program, what is the permissible scope of regulation? The answer is found by examining the purpose and scope of the federal program itself. Congress intended that colleges operating the BEOG program do so in a nondiscriminatory manner. *See Hillsdale College v. Department of Health, Education and Welfare*, 696 F.2d 418, 430 (6th Cir. 1982), *pet. for cert. pending*, No. 82-1538. Faced with the reality that imposing such a requirement on Grove City would be meaningless — because Grove City plays, at most, a de minimis role in

[9]The legislative history cited by the government (Govt. Br. at 20-31) is not contrary. Despite its contention that no change in the concept of recipient was intended from Senator Bayh's original 1971 non-discrimination proposal to his 1972 non-discrimination proposal, which was modeled on Title VI, the government supplies no authority for this proposition. It instead supplies extensive history on an issue that Grove City does not dispute — that Congress was concerned that institutions administer and distribute funds from *federal* student aid programs in a nondiscriminatory manner. Thus, when colleges choose to administer and distribute federal student assistance, Title IX regulation should apply to those programs and activities. The Title IX legislative history, aside from Bayh's statement that Department regulation would not be directed at assistance received by individual students (117 Cong. Rec. 30408 (1971)), supplies no clear resolution of the meaning of recipient under Title IX when the institution plays no role in the administration or distribution of the federal student assistance program. We contend that recourse to Title VI legislative history is necessary to determine the scope of "receiving Federal financial assistance" and that the history demonstrates congressional intent to exclude the types of direct student grants at issue here. *See* Pet. Br. at 28-33. Claims of what the legislative history "really was" by the amicus senators and representatives are suspect. Only 10 of the 50 members of Congress listed as amici served in the Congress which enacted Title IX; none played an important role in its passage.

the government's administration of the BEOG program — the government finds it necessary to expand the concept of "program or activity" to encompass the College's entire financial aid program. Govt. Br. at 16. Even though Grove City's financial aid program neither receives, disburses, nor administers federal student assistance dollars, the government claims a right to regulate that program, "including any financial aid dispensed from non-federal funds." *Id.* This expansion of "program or activity" is not significantly different from the Department's now discarded institution-wide interpretation of Title IX that the Third Circuit adopted. The Department's interpretation of program or activity is as troublesome and elusive as that which defines the entire institution as a program. The logical problems inherent in this interpretation of "receiving Federal financial assistance" support Grove City's position that it conducts no program receiving federal assistance.

During congressional debates, Congress referred to the particular underlying grant statutes as the "programs or activities" subject to regulation under Title IX. *See Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969). While the scope of Title IX regulation may vary depending upon the nature and purpose of the federal program involved,[10] where the entire purpose of a federal

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[10] In one example listed by the government (Govt. Br. at 19, n.23), the purpose of the grant statute, i.e., to aid a college's chemistry program, is broader than that involved in the present case. In that situation, the scope of Title IX regulation may properly extend beyond the administration or handling of federal dollars to the components of the chemistry program itself. Another grant statute with a potentially broader scope is that providing general federal impact aid to elementary and secondary schools. *See* 20 U.S.C. §§ 236-44. In the present case, however, the purpose of the BEOG program is to distribute federal dollars for use by individual student beneficiaries. Here, the program-specific scope of Title IX regulation must be limited to the intermediate recipient's participation in the administration and disbursement of those funds, subject always, to the caveat that discrimination by the recipient may be shown to infect the administration or disbursement of the funds and thus impact discriminatorily and hence illegally on the intended beneficiaries of the program. *See, e.g., Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 339 n.2 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

program is to distribute federal dollars to needy students, Title IX regulation cannot, consistent with its program-specificity requirement, extend to the entire spectrum of private loans, private scholarships, or student work opportunities that constitute an institution's financial aid program. Where an institution plays no role in administering or disbursing federal dollars, there can be no principled basis for regulating its administration and disbursement of private funds.

Contrary to the arguments of some amici, this interpretation does not spell the end for the progress Title IX has made in eliminating sex discrimination. Restricting the presumptive scope of Title IX regulation to an institution's programs or activities that are directly funded by the government will not create the compartmentalized discrimination feared by some amici. *See* Brief, *amicus curiae*, of American Asssociation of University Women, *et al.*, at 28. If discrimination outside a funded program infects beneficiaries' participation in the federal program, that program cannot be said to be free from unlawful discrimination. *See* Pet. Br. at 20, n. 18. To determine if a federally funded program is infected requires a fact-specific investigation, and, if infection is found, appropriate remedies. But these issues are not before the Court in this case since the record here reveals not even a hint of discrimination at Grove City. The issue of compartmentalized discrimination thus need not be addressed here.

POINT III

The Assurance of Compliance may not be saved by now interpreting it in a program-specific manner.

The government has retreated from its former interpretation of the Department's assurance requirement, claiming now that assurances "must . . . be written and construed in a program-specific manner." (Govt. Br. at 43). Despite this reversal of its position, a position never presented to the court of appeals or,

indeed, to the College, the government asks this Court to affirm the Third Circuit's judgment. Affirmance would terminate grants to Grove City students solely because the College refused to sign an overly broad Assurance which was not program-specific.

The government attempts to escape the implications of its change in position by quoting limiting language in the Assurance and implementing regulations, claiming that the Assurance may now be saved by applying retroactively a new, more limited interpretation. For this lawsuit and the Assurance form involved in it, however, the government is bound by its prior interpretation of the Assurance, at least insofar as it seeks to impose the funds-termination penalty endorsed by the court of appeals. If the government truly rejects an institutional application of the Assurance, it should also urge this Court to reverse the judgment below. An affirmance would enforce an interpretation of the Assurance "rejected by this Court and the Department and out of step with the language of the statute." (Govt. Br. at 43). It would also unfairly punish students despite the conceded invalidity of the Assurance.[11]

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[11]Contrary to the government's position (Govt. Br. at 48, n.57), its recognition that the prior Assurance requirement was overly broad is also an admission that its earlier Assurance violated its duty to state unambiguously the conditions it seeks to impose on the receipt of federal funds. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). It is outrageous for the government to contend that Grove City, which brought the erroneous position to the government's attention, should be punished for its foresight.

POINT IV

Federal funds may not be terminated absent a finding of actual discrimination.

Grove City maintains that the government cannot terminate the funds given to some of its students simply because it refused to sign an overly broad assurance of compliance. The District Court agreed, noting that no one was accusing the College of discrimination. The government's response misses the mark. In lengthy discourse, it defends the Department's right to promulgate an assurance of compliance requirement. Govt. Br. at 43-47. Then, without contesting the evidence of contrary congressional intent produced by Grove City (Pet. Br. at 42-47), the government concludes that once its ability to promulgate an assurance regulation is upheld, the remedy imposed for violation of the regulation must also be upheld. But Grove City does not contest the government's power to require a properly limited assurance of compliance from those educational institutions lawfully subject to Title IX. Rather, it challenges the propriety of the funds termination remedy when the assurance is not properly limited and where no discrimination is alleged or proved. The government recognizes that a termination remedy will punish innocent students, but contends that "Congress determined that such a remedy was appropriate in order to insure that federal funds were not used to support discrimination." (Govt. Br. at 45-46, n.53). That is precisely Grove City's point. Congress determined that the termination remedy was appropriate only in cases where discrimination was present. *See* Pet. Br. at 44-47. Where actual discrimination was not present, Congress provided for other, less drastic enforcement mechanisms, including those of contempt and injunction. *See* 20 U.S.C. §1682.

The government cites *Gardner v. Alabama*, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), to support its position. To the extent that case is relevant, it supports Grove

City's position, not the government's. In *Gardner*, the Fifth Circuit upheld a funds-termination remedy because federal funds were being used to support conceded discrimination. Thus, no authority exists to counter the unambiguous legislative intent that establishes that funds termination was intended to be a last-resort remedy imposed only after a finding of actual discrimination. The legitimacy of an assurance of compliance requirement is irrelevant to this issue. The remedy chosen to enforce that requirement, however, must be consistent with Congress' clear intention. By limiting funds termination to cases of actual discrimination, Congress intended to protect innocent beneficiaries from termination of their benefits.

Conclusion

Grove City College does not seek to attack Title IX, a statute whose purpose the College supports. Nor does the College discriminate in its practices or relationships with students, faculty or staff. The record contains not even an allegation that this College has discriminated or seeks any right to discriminate. Rather, Grove City protests expansion of the bureaucratic machinery which claims the power to regulate an entire college despite its deliberate and consistent refusal to accept even one dollar of federal or state aid. Receipt and use of federal entitlement grants by some students simply was not intended by Congress to subject a college to federal regulation under such circumstances, and this Court should reject the Department's attempt to expand its authority to do so. The judgment of the Court of Appeals should therefore be vacated.

Dated: November 18, 1983

Respectfully submitted,

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82-792

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UNITED STATES SUPREME COURT

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs

AFFIDAVIT IN OPPOSITION

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

STATE OF NEW YORK :
COUNTY OF MONROE : SS:
CITY OF ROCHESTER :

DAVID M. LASCELL, being duly sworn, deposes and says:

1. I am counsel of record in this case, argued November 29, 1983 before this Court.

2. I submit this affidavit in opposition to the application by the government to submit a supplemental memorandum.

3. I was informed on December 1, 1983 that the Solicitor General's Office wishes to file a supplemental memorandum to dispel confusion created by the oral argument and to outline the actual nature of the BEOG grants involved in this case. We perceived no confusion in the questions of the Court upon argument, and the nature of the grants involved here is already part of the Record. See Joint Appendix A-60, A-63, and A-26ff. Especially pertinent is the letter at A-30, which

describes the role of the government after the College refused to participate in the BEOG program.

4. Our memorandum opposing the consideration of the government's supplemental memorandum is attached. We believe that the government is attempting to reply to our latest brief and to questions by the Court in contravention of the Rules of this Court.

David M. Lascell

Sworn to before me this
1st day of December, 1983.

Eric Ward

ERIC WARD
Notary Public in the State of New York
MONROE COUNTY
Commission Expires March 30, 19.85

SUPREME COURT OF THE UNITED STATES
October Term, 1982

GROVE CITY COLLEGE, et al.

Petitioners,

No. 82-792

vs.

BELL, et al.

MEMORANDUM OF GROVE CITY COLLEGE

1. The government seeks to analyze this case, after argument, on the basis of what might happen, as opposed to what has happened during the course of this litigation. While the Secretary may claim the authority to eliminate the Alternate Disbursement System ("ADS"), in this case, students at Grove City have received assistance only through ADS and the College itself has received no federal money. Instead, the College has deliberately and consistently refused to participate in the BEOG program, whether via the ADS or the RDS system, a position the government has acknowledged. See letter, JA. 30. The case should be decided upon the record before the Court, not upon speculation about what the Secretary could do. The inconsistent positions of the Secretary are at the root of the problem; Grove City College has no predictable basis on which to act.

2. The government's proposed supplemental memorandum repeats the fallacious argument that the meaning of recipient under Title IX can only be understood by reference to the BEOG program, a position already argued by the government. Both Title IX and the BEOG program were parts of the omnibus Education Amendments of 1972, which involved many varieties of direct federal assistance to educational institutions. Congress' decisions regarding the scope of Title IX therefore are not dependent on any one federal program -- Title IX was meant to be applied to both existing and future means of providing federal financial assistance. Receiving federal financial assistance, as we have argued in our principal brief, takes its meaning from the conscious adoption in Title IX of the "program-specific" language used in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., where both the meaning of "Federal financial assistance" and "receiving" are well defined in the legislative history. See Pet. Br. at 28-33. How that assistance was to be provided, and, indeed, whether assistance to an educational program or activity was to be created, could be determined by future Congresses or by administrative regulation.

3. It is possible, therefore, for Title IX applicability to hinge upon the administrative discretion of the Secretary, if he is vested with that authority by Congress, or with the Congress itself.

4. Contrary to the government's newly articulated position, it appears that Congress did affirmatively contemplate that the Secretary calculate BEOG awards and send them directly to students. It was only later that the Secretary, acting pursuant to the authority vested in him by the BEOG statute (§ 20 U.S.C.A. § 1070a(b)(1)(?)(A)(West 1982 P.P.)), created a disbursement system which allowed institutions to receive, calculate, and disburse BEOG funds.

As written in 1972, and not significantly changed today, the BEOG statute requires that:

> The Commissioner shall . . . pay to each [eligible] student . . . a basic grant . . .

20 U.S.C. § 1070a(a)(1)(West 1982 P.P.). In contrast, the companion Supplemental Educational Opportunity Grant (SEOG)[1/] program operates "to provide, through institutions of higher education, supplemental grants to assist in making available the benefits of post secondary education to qualified students . . ." See 20 U.S.C. § 1070b(a)(West 1982 P.P.). The SEOG program also enacted

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1/ Grove City does not participate in the SEOG program.

in the 1972 Education Amendments, was the direct successor to the existing Educational Opportunity Grants Program contained in the Higher Education Act of 1965. See P.L. 89-329, Tit. IV, Section 401 (1965). Congress was thus conscious in 1972 that the usual means for disbursement of student assistance grants was through institutional participation. Yet, in the BEOG program it provided for a direct disbursement method.[2/]

5. Despite the government's new contentions, the result of these legislative choices is clear. Congress determined that direct aid to individual beneficiaries did not constitute federal financial assistance to a program or activity. The BEOG statute contemplates the provision of direct grants to students. The Secretary recognized this fact through the creation of the ADS. Grove City refused participation in the BEOG program, a fact recognized by the government, which provided direct

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2/ The original BEOG statute does not clearly contemplate institutional disbursement of BEOGs, although discretion to determine forms of payment was vested in the Secretary. See 20 U.S.C.A. § 1070a(b)(1)(3)(A)(West 1982 P.P.) A later amendment, added in 1976, demonstrates Congressional recognition that the Secretary was distributing BEOG funds through educational institutions. See 20 U.S.C.A. § 1070a(c), added by P.L. 94-328(1976).

grants to students nonetheless. In these circumstances, Grove City College does not become a recipient of Federal financial assistance.

December 1, 1983

Respectfully submitted

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No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, *et al.*,
Petitioners,

v.

TERREL H. BELL, SECRETARY OF EDUCATION, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS OF AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; AMERICAN COALITION FOR CITIZENS WITH DISABILITIES, INC.; CENTER FOR NATIONAL POLICY REVIEW; CHILDREN'S DEFENSE FUND; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.; EMPLOYMENT LAW CENTER; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION;

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-792

GROVE CITY COLLEGE, INDIVIDUALLY AND ON BEHALF OF ITS STUDENTS, *et al.*,
Petitioners,

v.

TERREL H. BELL, SECRETARY OF EDUCATION, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS OF AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *et al.*

INTEREST OF *AMICI CURIAE*

American Association of University Women; American Civil Liberties Union; American Coalition for Citizens with Disabilities, Inc.; Center for National Policy Review; Children's Defense Fund; Disability Rights Education and Defense Fund, Inc.; Employment Law Center; League of Women Voters of the United States; Mexican American Women's National Association; National Association of the Deaf; National Coalition of Independent College and University Students; National Education Association; National Federation of Business and Professional Women's Clubs, Inc.; National Student Educational Fund; National Women's Political Caucus; NOW Legal Defense and Education Fund; New York City Commission on the Status of Women; United States Student Association; Women Employed; Women's Equity Action League; and Women's Legal Defense Fund submit

this brief as *amici curiae* in support of the Respondent, filed upon the written consent of the parties in accordance with Rule 36.2 of the Rules of this Court.[1]

Amici curiae are a broad and diverse set of organizations working to end sex, race, national origin, and disability discrimination in educational institutions. This case arises under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 ("Title IX") which prohibits sex discrimination in any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681(a).

In this litigation, Grove City College advances an extremely limited view of the scope and coverage of Title IX, by defining the term "program or activity receiving [f]ederal financial assistance" in a most narrow fashion. Were Grove City's position to be adopted, many schools would be exempt from Title IX coverage in their entirety, and whole segments of other elementary and secondary schools and higher education institutions would also not be covered. The definition has comparable important consequences for the federal laws prohibiting discrimination on the basis of race and national origin (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI")), and disability, (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504")). *See also* the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07. In this brief, *amici* will address the specific arguments raised by Grove City College concerning the definition of "program or activity receiving federal financial assistance" under Title IX.

SUMMARY OF ARGUMENT

Although Grove City College receives federal funds through a substantial number of its students' tuition and fees payments which are financed by federal funds, the College claims that it does not receive federal financial

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[1] Written consents from counsel for the Petitioners and for the Respondent have been filed with the Clerk of the Court.

assistance within the meaning of Title IX.[2] Grove City argues first that federal student assistance does not constitute assistance to the College itself; and second, that because the student assistance flows throughout the College and is not earmarked for a particular program or activity within the College, none of these programs is covered.

Both of Grove City's arguments are incorrect. The plain language of the statute, the legislative history of Title IX and Title VI, upon which Title IX was based, as well as the case law on point, make clear that a school is covered when its students receive federal financial aid. The aid clearly goes to the school in the form of payment of tuition and other charges. Congress has consistently viewed these funds as aid to the school as well as to the students.

Moreover, the fact that the federal monies flow throughout the College once received does not, despite Grove City's arguments to the contrary, immunize the College from its obligations to comply with Title IX. The legislative history of Title VI and Title IX and relevant case law confirm that although Title IX only covers those programs and activities receiving federal financial assistance, in this case, given the nature of the federal funds at issue which enter the College's general fund and flow throughout the school, all of its component programs and

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[2] Grove City students receive Basic Educational Opportunity Grants ("BEOGs"), 20 U.S.C. § 1070a, and Guaranteed Student Loans ("GSLs"), 20 U.S.C. § 1071. The BEOG program provides education grants on the basis of income and need standards. The assessment of need includes the actual tuition and fees charged by the school. The GSL program provides both loan guarantees and grants to pay a portion of the interest on the loans for students attending "eligible institutions." 20 U.S.C. § 1071(a). Despite the large portion of the GSL program comprised of grants rather than loan guarantees, the Department failed to appeal the District Court's ruling that the GSL program falls within the statutory exception for loan guarantees. *Grove City College v. Bell*, 687 F.2d 684, 690 n. 10 (3d Cir. 1982).

activities are receiving and benefiting from federal funds and therefore are covered.

ARGUMENT

The Court of Appeals determined, first, that Grove City College is a recipient of federal financial assistance and therefore covered by Title IX; and second, that because of the type of financial assistance Grove City receives—student financial aid which flows throughout and benefits the entire school—all of the College's particular programs and activities are covered by Title IX.[3]

Following the analysis employed by this Court in determining whether Title IX reaches employees as well as students in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), a full reading of both the legislative history and case law demonstrates that the Court of Appeals correctly determined that the federal financial assistance received by Grove City subjects the entire College to Title IX.

I. THE EXPRESS LANGUAGE OF TITLE IX AND ITS LEGISLATIVE HISTORY ESTABLISH THAT FEDERAL FINANCIAL ASSISTANCE TO STUDENTS AT GROVE CITY COLLEGE SUBJECTS THE COLLEGE IN ITS ENTIRETY TO TITLE IX.

A. The Express Language of Title IX.

As this Court stated in *North Haven Board of Education v. Bell*, *supra*, the "starting point in determining the scope of Title IX is, of course, the statutory language." 456 U.S. at 520. Section 901(a) of Title IX contains the "broad directive" *id.*, that

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[3] Title IX regulations provide:

> (h) "Recipient" means . . . any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h).

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a).

There is nothing in the language of Section 901(a) which suggests that programs or activities must receive federal financial assistance directly. There is nothing which suggests that funds will not be considered received if they flow to the program or activity through another person or entity, such as students. There is nothing in this language which suggests that programs or activities will not be considered to have received funds unless the funds are specifically designated by the government for those programs' use. Therefore, the plain language of Section 901(a) does not support Grove City's contention either that federal student aid is not received by the school because it flows to the school through the student, or because it is not designated for particular programs or activities in the school itself, but rather may be used by any part of the school once received.[4]

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[4] It is unclear whether Grove City concedes that if the financial aid were provided to the College to distribute to students, Grove City would be a recipient of federal financial assistance (Brief at 21 n. 19), but given the fact that throughout its brief Grove City appears to take the position that student financial aid *per se* is not federal financial assistance, *amici* assume that resolution of the question whether Grove City is a recipient does not turn on whether the College chooses to distribute the federal funds to its students under the Regular Disbursement System, *see* 34 C.F.R. §§ 690.71-690.85, or provide forms to its students so they may apply for federal funds themselves under the Alternative Disbursement System, *see* 34 C.F.R. §§ 690.91-690.96. As will be seen, Congress clearly did not distinguish between the manner in which funds may be administratively disbursed for purposes of Title IX coverage, and, indeed, it would be anomalous to permit schools to discriminate because they choose one means of administration of federal funding over another but nonetheless continue to receive the funding.

Moreover, the use by Congress in Section 901 of the terms "program or activity" rather than "recipient," "political entity" or "institution" elsewhere in Title IX, does not convey that only programs or activities that directly receive federal financial assistance are covered. A political entity, for example, may have particular programs and activities which receive federal funds directly or indirectly while other parts have no connection to or benefit from the federal funds at all. The fact that there may be circumstances where not all of an entity consists of programs or activities receiving federal funds does not mean that direct receipt must be required for the parts that do.

In short, the statutory language of Title IX contains no restrictions on the term "receipt," nor in any way suggests a restriction to the direct receipt of such assistance. Applying the principle that " 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language' [citations omitted]," this Court in *North Haven* found nothing in the statutory language to suggest that Congress intended to exclude employees from the statute's protection. *See* 456 U.S. at 521. Similarly, nothing in the declaration of rights in Section 901(a) or elsewhere in Title IX, suggests that Congress intended to limit the meaning of receipt of federal financial assistance to only certain types of receipt.

B. The Legislative History.

The legislative history of Title IX confirms that Congress fully intended to include financial aid to students as federal financial assistance that would bring a school in its entirety within the scope of Title IX.

1. *Receiving Federal Financial Assistance.*

The contemporaneous legislative history of the Educational Amendments of 1972, of which Title IX was a part, establishes that the entire thrust of the legislation was to create a unified approach to federal assistance to

education, including federal financial aid to students, and to establish that such federal financial assistance would trigger a new prohibition on sex discrimination in educational programs and activities.

Title IX was originally introduced by Senator Bayh in August, 1971, as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971. *See* 117 Cong. Rec. 30155 (1971). In addition to continuing existing programs of student financial assistance, the Amendments established the Basic Educational Opportunity Grant program, the source of federal funds at issue here. Senator Pell, the sponsor of the legislation, clearly viewed this program as federal financial assistance to schools, in describing his bill as

> the first attempt to treat the subject of Federal support to higher education as a unified whole. . . . Student assistance is coupled with institutional aid; specialized study areas are treated as one. Unity has been achieved so that the total commitment of the Federal Government to higher education can be fully realized and understood—understood as to the philosophy motivating the Congress to choose this approach rather than others.

Id. at 2007-8.[8]

Senator Bayh proposed to amend this "most far-reaching program of Federal aid to higher education," *id.* at 30403 (remarks of Sen. Bayh), to ban sex discrimination in education carried out with this federal aid. From the outset he linked the new student financial assistance in the bill and the amendment that was the

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[8] This aid is still seen as a critical source of assistance to colleges and universities. *Appropriations for 1982: Hearings Before the Subcomm. on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Comm. on Appropriations*, 97th Cong., 1st Sess., Part 9, 602, 610-611 (1981) (testimony of David Knapp and John Frazer on behalf of 11 associations of colleges and universities) ("Knapp Testimony").

precursor of Title IX. *Id.*[6] Later, in a colloquy with Senator Dominick on the kinds of aid that might be terminated under the amendment, Senator Bayh made clear that he viewed it as reaching "all aid that comes through the Department of Health, Education, and Welfare," and stated that he doubted "whether even one institution of higher education [today], private or public, is not receiving some Federal assistance." *Id.* at 30408. Moreover, contrary to Grove City's assertion (Brief at 24-25), Senator Bayh's statement during this colloquy that termination of funding "would not be directed at specific assistance that was being received by individual students, but would be directed at the institution," *id.*, does not suggest that student aid was excluded from the federal financial assistance covered by Title IX. Rather, Senator Bayh acknowledged that the termination of such aid would be a "possib[le] . . . sanction," *id.*, but expressed his hope that the Secretary would use "good judgment" in employing that sanction and "would use only such leverage as was necessary against the institution." *Id.*[7]

Because Senator Bayh's amendment was ruled nongermane, *id.* at 30413-15, it was not until the following year that the Senate passed the amendment that was to become Title IX. In the interim, the House version of the education amendments, the Higher Education Act of 1971, H.R. 7248, 92d Cong., 1st Sess. (1971), was passed with a provision prohibiting sex discrimination in educa-

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[6] Similarly, Senator McGovern, speaking in support of Senator Bayh's amendment, described it as assuring that "no funds from [the Pell bill] . . . be extended to any institution which practices biased admissions or educational policies." *Id.* at 30158-59.

[7] Senator Dominick stated that "many private institutions . . . receive at least 50 percent of their operating costs from the Federal Government . . . [s]o that although we claim they are private, they are in fact receiving an enormous amount of help through one agency of Government or another, mostly through the HEW program." *Id.* at 30408. After this colloquy with Senator Bayh, he stated that he did not intend to object to the amendment. *Id.*

tion programs and activities receiving federal financial assistance. *See* 117 Cong. Rec. 39353-54 (1971).

The House bill to which this provision was attached, like its Senate counterpart, included student financial aid in the form of educational opportunity grants. *See* H.R. Rep. No. 554, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2464-65.[8] Moreover, House members in voting on the bill were well aware that the assistance contained in the bill constituted federal financial assistance under the nondiscrimination provision because opponents of the latter provision argued that to withdraw such assistance because of discrimination would be to work at cross-purposes with the intent of the overall bill. *See* 117 Cong. Rec. 39249 (1971) (remarks of Rep. Erlenborn).

When the Senate reconsidered the higher education bill in the following year, Senator Bayh reintroduced his nondiscrimination amendment. *See* Amendment No. 874 to S. 659, 92d Cong., 2d Sess., 118 Cong. Rec. 5803 (1972). The debate again makes clear that student financial aid would bring an institution with the scope of Title IX.[9]

Although Grove City makes much of the differences between the language of Senator Bayh's 1971 amendment

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[8] Indeed, in Supplemental Views some members of the committee observed that "Federal dollars now constitute over 20% of the total budget of our higher education system. Most of these dollars flow to *institutions through* research contracts, *student assistance programs*, and categorical programs. . . ." *Id.* at 2584 (emphasis added).

[9] For example, Senator Bentsen, in introducing an amendment to except from Title IX the admissions practices of public, traditionally single-sex institutions, referred to federal student assistance used to pay tuition and fees. He stated:

> If [f]ederal funds are cut off, it is the students who will suffer. [Texas Women's University] now receives over $250,000 in education opportunity grants; it receives $83,000 for college work-study programs.

118 Cong. Rec. 5814 (1972). *See also* 117 Cong. Rec. 30408 (1971) (remarks of Sen. Bayh).

and his 1972 amendment, both versions were amendments to the same higher education bill that included student financial aid as federal financial assistance to an institution. After Title IX passed the House, in 1972 Senator Bayh simply substituted the language of the House-passed version for his earlier language without reference to the change in language. He explained the 1972 version as a "comprehensive approach which incorporates . . . the key provisions of my earlier amendment. . . ." 118 Cong. Rec. 5808 (1972).

The legislative history also rebuts Grove City's assertion that Congress viewed student aid as separate and distinct from institutional aid.[10] In fact the legislation was to treat the two forms of aid as part and parcel of one package.[11]

Events subsequent to the passage of Title IX also confirm the inclusion of student financial aid under Title IX. In 1974, after HEW had issued proposed regulations under Title IX including student financial aid as federal

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[10] Grove City relies in part, for this argument, on the hearings in the House report under which the kinds of aid fell—with "student assistance" under one heading and "institutional aid" under another. (Brief at 27.) As this Court made clear in *North Haven*, however, when the content of the material within the hearings negates the distinction attempted to be drawn from the language of the headings, no particular significance should be attached to the headings. *See* 456 U.S. at 525.

[11] A controversy between the House-passed and Senate-passed version confirms the unified nature of the act. In the House version, the amount of institutional aid a school received was tied simply to the number of students in attendance. *See* H.R. Rep. No. 798, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2608, 2674. In the Senate version, however, the amount of institutional aid was based on the number of students receiving Basic Educational Opportunity Grants and other forms of financial aid. *Id.* at 2673. The Senate version prevailed and in fact was described by Rep. Boggs as a "program of direct, general assistance." 118 Cong. Rec. 20319 (1972). *See also id.* at 18437 (remarks of Sen. Pell) ("All but 10 percent of the institutional aid provisions are tied to the student assistance provisions.")

financial assistance, an amendment that would have limited the definition of federal financial assistance failed to win congressional approval.[12]

Six months later, the Department of Health, Education, and Welfare promulgated its regulations which expressly included student financial aid within federal financial assistance. *See* 40 Fed. Reg. 24128 (1975). The regulations were approved by the President and sent to Congress for review as provided by statute.[13] Several efforts were made to cut back on the broad reach of the regulations, including their definition of federal financial assistance. None succeeded.[14]

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[12] That amendment provided that payments authorized under Part A of the Medicare Program, 42 U.S.C. § 1395 *et seq.*, for persons who receive care in nursing homes or other similar facilities operated by a fraternal organization would not be deemed to be federal financial assistance for purposes of any other federal law. *See* 120 Cong. Rec. at 39993-94. According to the sponsor of the amendment, Senator Griffin, its purpose was to correct HEW's determination that such payments constitute federal financial assistance under Title VI. *Id.* at 39994. The amendment by its terms also would have affected Title IX. Like Grove City, Senator Griffin viewed the HEW determination as incorrect because "the medicare program was designed primarily to assist individuals not institutions or organizations." *Id.* Although the amendment passed the Senate, the House conferees refused to accept it, and its narrow interpretation of federal financial assistance. *See* S. Rep. No. 1409, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6793, 6797.

[13] Pursuant to the General Education Provisions Act, 20 U.S.C. § 1232, Title IX regulations could not become effective until Congress had had forty-five days to review the regulations and to reject them. Although the statute was later amended to provide that failure to disapprove regulations does not constitute a finding of consistency with the underlying legislation, *see* Pub. L. 93-380, 88 Stat. 567, codified at 20 U.S.C. § 1232(d)(1), the Title IX regulations were finalized before the law was so amended.

[14] In the House, Representatives Martin and O'Hara introduced four resolutions disapproving the regulations, which were referred to the Committee on Education and Labor. *See* 121 Cong. Rec. 19209, 21687 (1975). In the Senate, resolutions of disapproval were introduced by Senator Helms, *see* S. Con. Res. 46, 94th Cong.,

The Subcommittee on Postsecondary Education held six days of hearings on the regulations at which then-Secretary Weinberger stated:

> Our view was that student assistance, assistance which the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.

Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 484 (1975).[15] The Subcommittee on Equal Opportunities also held a one-day hearing specifically addressing this issue.[16] None of the resolutions of disapproval advanced

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1st Sess., 121 Cong. Rec. 17300-01 (1975), and Senator Laxalt, *see* S. Con. Res. 52, 94th Cong., 1st Sess., 121 Cong. Rec. 22940-41 (1975), aimed at excluding programs covered because of receipt of student assistance.

[15] *See also, e.g., id.* at 117-21 (statement of representatives of National Collegiate Athetic Association); *id.* at 153 (statement of Rep. Chisholm); *id.* at 165-66 (statement of Cong. Mink); *id.* at 199 (statement of Rep. McKinney). *See also id.* at 169-71, 173-75, 178, 180-84 (statement of Sen. Bayh). Although Grove City asserts that in this testimony Senator Bayh stated that he did not believe that student financial aid was federal financial assistance under Title IX (Brief at 25), no such clear-cut statement was made. *See Sex Discrimination Regulations Hearings, supra*, at 182. Moreover, Senator Bayh repeatedly made clear elsewhere in his testimony that indirect financial assistance would bring all of a school's programs and activities under the statute. *See id.* at 169-71, 173-75, 178. Finally, as Grove City itself acknowledges (Brief at 25 n.23), Senator Bayh later, in both speaking and voting against an amendment that would have exempted student assistance from the definition of federal financial assistance under Title IX, took the position that such assistance was always intended to be covered by the statute. *See, e.g.*, 122 Cong. Rec. 28144-45 (1976), 117 Cong. Rec. 30408 (1971).

[16] *Hearing on House Concurrent Resolution 330 Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor*, 94th Cong., 1st Sess. (1975). During the testimony of the HEW witnesses, there was discussion of the implica-

in the House or Senate passed, and consequently the HEW regulations, including Section 86.2(g)(1)(ii), defining federal financial assistance to include financial aid to students, went into effect in July, 1975.[17]

Later efforts to limit the definition of federal financial assistance were also unsuccessful. In 1976, Senator McClure introduced an amendment to ensure that "when it is only the indirect effects of Federal moneys flowing in by way of student assistance the institution should not be subjected to Federal control . . . ." 122 Cong. Rec. 28145 (1976). The amendment was defeated, *id.* at 28147.

In 1981, Senator Hatch introduced an amendment that the only student financial aid constituting federal financial assistance would be that which the institution administers and has discretion over regarding the selection of student recipients, and that Title IX's coverage is limited to programs or activities "directly" receiving federal financial assistance. *See* S. 1361, 97th Cong., 1st Sess., 127 Cong. Rec. 6125 (daily ed. June 11, 1981). In introducing the amendment, Senator Hatch stated that it was intended to "dispose of the issues in the Grove City College versus Harris case, currently in litigation . . . ." 127 Cong. Rec. 6124.[18]

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tions for Title IX of *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), on veterans' benefits covering Bob Jones under Title VI. *See Hearing on House Concurrent Resolution No. 330, supra*, at 37. The Women's Equity Action League also submitted a statement on student aid. *See id.* at 51-54. At the conclusion of the hearing, the Subcommittee voted to recommend against passage of the resolution. *North Haven Board of Education v. Bell*, 456 U.S. at 533.

[17] This Court noted in *North Haven* that "the relatively insubstantial interest given the resolutions of disapproval that were introduced seems particularly significant since Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute," citing the addition of §§ 901(a)(6) and 901(a)(7)-(9) to the statute. 456 U.S. at 534 & n.25.

[18] Attachment A, a letter dated May 3, 1982 from Senator Hatch to a constituent, demonstrates that Senator Hatch determined that such a weakening amendment to Title IX was unwise.

In short, both the contemporaneous and postenactment legislative history of Title IX confirm that Congress intended to include financial aid to students within the federal financial assistance that subjects a school to Title IX.

2. Program or Activity.

The legislative history also confirms the companion principle that student financial assistance which flows throughout a school because it is used to pay tuition and fees brings all of that school's programs and activities within Title IX.

Congress determined in Title IX to "guarantee that women . . . enjoy the educational opportunity every American deserves." 117 Cong. Rec. 30155 (1971). The broad scope of that protection was underscored by Senator Bayh when he introduced Title IX. In his statement he said:

> . . . I believe a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

118 Cong. Rec. 3935 (1972).

Clearly, a description of Title IX as a strong, comprehensive law providing solid legal protection against sex discrimination in education is at odds with an interpretation of "program or activity" requiring direct receipt of earmarked funds. Under Grove City's approach, this solid and comprehensive protection would be unavailable whenever a school received federal funds flowing throughout its programs. Moreover the position articulated by the Court in *Hillsdale College v. Dept. of Education, et al.*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3704 (Mar. 16, 1983) (No. 82-1538) that the funds are earmarked for financial aid and therefore only the distribution of financial aid is covered, flies in

the face of the broad-based purpose. Under this reading, large sums of federal funds could flow throughout the school,[19] supporting all of its programs and activities, yet all except the financial aid program would be free to discriminate with the use of those funds. Surely, Congress was not so cynical as to pass a law designed to combat sex discrimination in schools intending that it would have so little effect.

Moreover, by carving out exceptions to the statute, both at the time Title IX was passed and to address subsequent concerns about Title IX's scope, Congress made clear that when it wanted to exclude from the statute's coverage particular programs and activities of an institution, it would do so expressly. *See* 20 U.S.C. §§ 1681 (a)(1)-(9), 1686. Never did Congress rely upon, and indeed several times it rejected, the argument that a school's particular programs or activities would be covered by Title IX only if they received federal funds directly.

For example, in 1974, after HEW had issued proposed regulations under Title IX but before the regulations went into effect, Congress amended Title IX to exempt the membership practices of certain social fraternities and sororities and youth service organizations. Pub. L. 93-568, § 3(a), 88 Stat. 1862 (1974), codified at 20 U.S.C. § 1681(a)(6). In introducing the amendment, Senator Bayh explained that unless it were enacted the statute would clearly apply to such organizations because they receive "indirect financial assistance" from institutions receiving federal funding or "direct Federal funds for various educational programs." 120 Cong. Rec. 39992 (1974). Moreover, in the debate on the amendment in the House, the discussion focused on whether, by approv-

[19] The federal student aid funds constitute substantial amounts of money. Hundreds of thousands of students and billions of federal dollars are at issue. *See* Knapp Testimony *supra* at 605-6, 608-9. Schools are not receiving only one dollar of this federal aid; rather, even small schools receive thousands of dollars of such assistance annually.

ing the amendment, Congress would be giving approval to the "institutional approach" which the Department of Health, Education, and Welfare had taken in its proposed regulations on Title IX:

> If we adopt the amendment . . . it is going to be hard ever coming back to HEW and saying, "What you are doing is wrong". . . .
>
> What the language does in this section . . . is to condone, in my judgment, the institutional approval [sic] which HEW is now attempting to do. They are saying we will regulate and even cut off Federal assistance to the whole of the institution, not just to a program or activity.

Id. at 41390 (remarks of Rep. Steiger). *See* also *id.* at 41393 (remarks of Rep. Quie). Despite this admonition, the amendment exempting social fraternities and sororities and youth service organizations was adopted. *See id.*

Later efforts to limit the coverage of Title IX to programs and activities directly receiving federal funds were also unsuccessful. One such effort was an amendment introduced by Senator Helms. *See* S. 2146, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 23845-47 (1975). He explained: "[t]he bill provides that Title IX shall apply only to education programs and activities which directly receive Federal financial assistance . . . ." 121 Cong. Rec. 23846 (1975). No action was taken on Senator Helms' bill. Another effort was the amendment recently proposed by Senator Hatch, containing similar language, which also was never acted upon. *See* discussion *supra* p. 13.

Finally, Congress' consistent position that intercollegiate athletics is covered under Title IX is particularly instructive on the issue of direct receipt of federal funds. Throughout the debates on Title IX coverage of intercollegiate athletic programs, Congress was fully aware that such programs were covered even though they only indirectly received federal financial aid.

In 1974, Senator Tower introduced an amendment initially drafted to exclude all intercollegiate athletics but ultimately worded to exclude "revenue producing" intercollegiate athletic activities from Title IX. *See* S. 1343, 93d Cong., 2 Sess., 120 Cong. Rec. 15322 (1974). Instead, Congress adopted an amendment offered by Senator Javits requiring HEW to prepare and publish proposed regulations which included reasonable provisions on intercollegiate athletics. *See* Pub.L. 93-380, Title VII, § 844, 88 Stat. 612 (1974).

HEW thereafter included within its Title IX regulations a prohibition against sex discrimination in athletics at all levels. *See* 40 Fed. Reg. 24128 (1975). At the time these regulations were reviewed by Congress, not only then-Secretary Weinberger but a majority of the witnesses who testified addressed the coverage of athletic programs under Title IX. *See Sex Discrimination Regulations: Hearings, supra passim.* Many of these witnesses presented the view taken by Grove City that direct receipt of federal funds is a prerequisite to regulatory coverage under Title IX and therefore athletic programs were not covered. *See id.* Congress rejected this position and allowed the regulations to go into effect.[20]

On July 15, 1975, after the HEW regulations were permitted to go into effect, Senator Tower reintroduced his amendment of the previous year. *See* 121 Cong. Rec. 22777 (1975). It never passed. Finally, on August 27,

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[20] As the district court in *Haffer v. Temple University*, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982), pointed out, Congress could not have been unaware at the time of the intensity of the debate over coverage of indirectly funded athletic programs. Twelve members of Congress testified at the subcommittee hearings and "Title IX coverage of intercollegiate athletic programs was even the subject of newspaper comic strips. . . ." *Id.* at 536. Moreover, two of the resolutions of disapproval were expressly directed at the athletics regulations. *See* 121 Cong. Rec. 19209 (1975) (Rep. Martin); *id.* at 22940-41 (Sen. Laxalt).

1976, the Senate defeated another amendment to Title IX similar to the Tower Amendment, designed to exclude intercollegiate athletics from coverage. See 122 Cong. Rec. 28136, 28147 (1976).

In sum, a review of the legislative history of Title IX shows that Congress consistently rejected the identical arguments made by Grove City in this case that only federal financial assistance that is "directly" received by a program or activity will bring that program or activity under Title IX—first when Title IX was passed in 1972, again when the statute was amended in 1974 to exclude certain programs and activities, again when the HEW regulations were permitted to go into effect, again when the Helms, McClure, and Tower amendments were not passed, and, most recently, when the Hatch amendment was not passed. Congress has demonstrated repeatedly its intention that, given the nature of federal funding to schools in this country, and in particular student aid which flows throughout the school, those schools would be covered by Title IX in their entirety. That only Grove City's student aid program need comply with Title IX, and that it could be free to discriminate in all of its other programs and activities, including its academic departments and its intercollegiate athletic program, flies in the face of Congress' clear intent in passing and continuously reaffirming Title IX's routine coverage of those parts of schools.

II. TITLE VI, THE MODEL UPON WHICH TITLE IX WAS BASED, DEMONSTRATES THAT FEDERAL FINANCIAL ASSISTANCE TO STUDENTS AT GROVE CITY COLLEGE SUBJECTS THE COLLEGE AND ALL OF ITS PROGRAMS AND ACTIVITIES TO TITLE IX.

Title IX was expressly modeled after Title VI to provide the same protection against sex discrimination in education.[21] In 1972, when Title IX was enacted, Title

[21] *North Haven Bd. of Educ. v. Bell*, 456 U.S. at 549. From the earliest discussion of Title IX on the floor of the House and Senate,

VI's prohibition against discrimination had already been interpreted as far-reaching in its scope, to apply to both direct and indirect receipt of federal financial assistance. *See, e.g., Bossier Parish School Board v. Lemmon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *cert. denied sub nom. Caddo Parish Board of Education v. United States*, 389 U.S. 840 (1967). In *Bossier Parish*, a school board that accepted general, unrestricted funding in the form of Impact Aid, 20 U.S.C. §§ 237-41, "brought its *school system* within the class of programs subject to the section 601 prohibition against discrimination." 370 F.2d at 850 (emphasis supplied). Similarly, in *Jefferson County*, Title VI was held to apply to "services, facilities, activities, and programs that may be conducted or sponsored by, or affiliated with, the school in which a student is enrolled." 370 F.2d at 891.[22] Nowhere in these inter-

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members acknowledged that Title IX was modeled on Title VI and was intended to draw on the body of law established under Title VI. *See* 117 Cong. Rec. 30156, 30408 (1971); 118 Cong. Rec. 3937, 39256, 5807 (1972).

Not only prior to passage of Title IX were there several statements by members of Congress that the statutory coverage should be interpreted in accordance with precedents under Title VI, but subsequent attempts to modify Title IX by restricting the meaning of "program or activity" and "federal financial assistance," including in ways urged by Grove City in this case, were rejected in part because they would have made it impossible to reconcile the language of Title IX with the precedents set under Title VI. *See, e.g.*, 122 Cong. Rec. 28145 (1976).

[22] *See also United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *modified*, 447 F.2d 441 (5th Cir. 1971), (desegregation of nine school districts ordered under Title VI); *United States v. Tatum Indep. School Dist.*, 306 F. Supp. 285 (E.D. Tex. 1969) (United States granted injunction against school district for violation of Title VI in failure to implement desegregation plan); *Hicks v. Weaver*, 302 F. Supp. 619 (D. La. 1969) (U.S. Department of Housing and Urban Development enjoined from making further payments of federal funds to Housing Authority of Bogalusa until decision on merits of whether location of public housing

pretations is there a suggestion that federal financial assistance in the form of student financial aid would not bring a school within Title VI or that Title VI is otherwise limited to particular programs or activities that are "directly" funded by the federal government.[23] As this Court has recognized, moveover, Congress was well aware of these interpretations of Title VI. "[B]ecause of their repeated references to Title VI. . . we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." *Cannon v. University of Chicago*, 441 U.S. 677, 697-98 (1979).

Although ". . . the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was," *id.* at 711, *quoting Brown v. GSA*, 425 U.S. 820 (1976),[24] the legislative history of Title VI confirms that Congress in 1972 correctly perceived that student financial aid would bring all of a school's programs and activi-

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projects in racially segregated neighborhoods throughout the city violated Title VI).

In addition to these reported cases, between 1965 and 1971 HEW instituted approximately 600 administrative enforcement proceedings under Title VI against school districts, and terminated all federal assistance to districts in 45-50 cases. *See* Affidavit of Leon Panetta, *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified in part and aff'd in part en banc*, 480 F.2d 1159 (D.C. Cir. 1973). Congress was clearly aware of this activity, both because Title VI requires that Congress be given notice of proposed terminations of funds, *see* 42 U.S.C. § 2000d-1 and because of several attempts to amend Title VI in the mid-1960's, that were triggered by its use by HEW. *See* G. Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act*, 264-328 (1969).

[23] Similarly, long-standing contemporaneous agency regulations have consistently interpreted Title VI as far-reaching in its scope, without limitation to programs or activities that are "directly" funded with federal financial assistance. *See* 45 C.F.R. § 293 *et seq.*

[24] *See also North Haven Bd. of Educ. v. Bell*, 456 U.S. at 529.

ties under Title VI. For example, at the hearings on Title VI, then-Secretary of the Department of Health, Education, and Welfare Celebrezze provided a list of HEW-funded programs that would bring an institution within its scope. The list specifically included the kind of assistance at issue in this case, "loans to college students," and federally financed fellowships. *Civil Rights Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong. 1st Sess., Pt. II at 1537-38 (1963). *See also id.* at 1541-42.[25] Indeed, those who opposed Title VI's passage employed as one of their arguments the fact that student educational loans and grants would constitute federal financial assistance under the statute. *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2462, 2471.

Grove City's argument (Brief at 29-30) that the change in language from the original version of Title VI demonstrates that Title VI applies only to programs or activities that directly receive federal financial assistance is similarly misplaced. The elimination from Title VI of the entire phrase "direct and indirect financial assistance," H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963), and the substitution of the phrase "any program or activity receiving federal financial assistance" was calculated to establish that coverage of a program by Title VI would not turn on whether federal funds are received *either* directly or indirectly. Not only did Congress not delete just the word "indirect," but references to indirectly funded programs appear in the

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[25] The statements of then-Deputy Attorney General Katzenbach and some members of Congress that direct payments to individuals are not federal financial assistance, cited by Grove City (Brief at 30-32), do not contradict this legislative history. The point that these statements were making is that direct, *unrestricted* payments from the government to an individual, such as Social Security, would not be payments to a program or activity under Title VI. *See Bob Jones University v. Johnson*, 396 F. Supp. at 602 n.16.

debates after the wording was changed. *See, e.g.*, 110 Cong. Rec. 7058 (1964).

In short, Congress in enacting Title IX was aware that Title VI had been interpreted and implemented to apply to programs and activities receiving federal financial assistance without regard to whether that assistance was received directly or indirectly, and that financial aid to students would bring a school under Title VI. Congress' awareness of these interpretations confirms that it intended that federal financial assistance to students bring the institution that those students attend, and all of its programs and activities directly or indirectly receiving those funds, under Title IX.[26]

III. THE CASE LAW CONFIRMS THAT FEDERAL FINANCIAL ASSISTANCE TO STUDENTS AT GROVE CITY COLLEGE SUBJECTS THE COLLEGE IN ITS ENTIRETY TO TITLE IX.

Decisions of this Court as well as the lower federal courts under Title IX, Title VI, Section 504 and the Fourteenth Amendment confirm that federal financial assistance to students flowing throughout the school brings all of that school's programs and activities within Title IX.

All of the courts that have considered the question have held that federal student aid is federal financial assistance received by a school for purposes of Title IX, Title VI, or Section 504. *See Hillsdale College v. Department of Health, Education, & Welfare, supra*, (Title IX);

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[26] Interpretations of Title VI since 1972 similarly support the breadth of that statute, and by analogy Title IX's reach. *See Lau v. Nichols*, 414 U.S. 563 (1974); *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); *Yakin v. University of Illinois*, 508 F. Supp. 848 (N.D. Ill 1981); *Flanagan v. President & Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976); *Bob Jones Univ. v. Johnson, supra. Bob Jones*, in which the court squarely decided that federal financial assistance to students would subject the university to liability under Title VI, is cited approvingly in the legislative history of the 1976 amendments to Title IX. *See* 122 Cong. Rec. 28145 (1976).

Haffer v. Temple University, *supra* (Title IX); *Grove City College v. Bell*, *supra* (Title IX); *Bob Jones University v. Johnson*, *supra* (Title VI). *See also United States v. Baylor University Medical Center*, No. CA-3-82-0453-D (N.D. Tex. June 7, 1983) (Section 504). The principle enunciated in these cases, which are based on the language and legislative history of the statutes involved, flows from a tradition of case law in this Court under the Fourteenth Amendment, exemplified by *Norwood v. Harrison*, 413 U.S. 455, 464 (1973) (the loan of textbooks to students attending racially segregated schools was "a form of financial assistance inuring to the benefit of the private schools themselves," even though no state assistance was provided directly to the schools).[27]

Cases under Title IX, Title VI, and Section 504 have also held that direct or indirect federal financial assistance covers specific education programs or activities within a school. In *Haffer v. Temple*, *supra*, the Court held that the intercollegiate athletic program was covered by Title IX, although it did not receive earmarked federal funds. In *Wort v. Vierling*, No. 82-3169 (C.D. Ill. May 28, 1982), the court held that discrimination in the National Honor Society is subject to Title IX even in the absence of direct federal financial assistance to the society.[28] In *Yakin v. University of Illinois*, *supra*, the court held that the plaintiff's complaint of discrimination in his termination from a Ph.D. program could not be dismissed on the grounds that neither the program nor

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[27] *See also Committee for Public Education v. Nyquist*, 413 U.S. 756, 783 (1973) (state tuition reimbursement to parents of children attending private schools "unmistakably . . . provide[s] desired financial support for [such] institutions"); *Griffin v. State Board of Education*, 239 F. Supp. 560, 563 (E.D. Va. 1965), *modified on other grounds*, 296 F. Supp. 1178 (E.D. Va. 1969) ("Nor do we think weight is to be accorded the fact that the money is paid to the pupil or parent and not to the school, for the pupil or parent is a mere channel").

[28] *See also Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779, 781 n.1 (N.D. Ohio 1976).

the plaintiff himself "receive[d] federal financial assistance directly," so long as such assistance was received by the university generally. 508 F. Supp. at 850. Similarly, in *Flanagan v. President & Directors of Georgetown College, supra*, the court held that federal financial assistance for the construction of a building subjected an education program that used the building to Title VI for discrimination in its distribution of financial aid, over the protest of the school that the federal assistance was unrelated to the financial aid.[29]

In *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the court remanded to HEW for specific agency findings whether three federal grant programs (for supplementary education centers, adult education, and the education of children from low-income families) were affected by discrimination in the school system. The court stated that "there will . . . be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a 'political entity or part thereof'), is effectively insul..ed from

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[29] *See also NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979) (Title VI and Section 504 found to create a private right of action to challenge the relocation of major components of the Wilmington Medical Center from their inner-city location to an outlying suburban location, without discussion of whether those components received federal financial assistance directly earmarked for their use); *Uzzell v. Friday*, 547 F.2d 801, 802 (4th Cir. 1977) (regulations of University of North Carolina requiring that a certain number of minority group members be appointed to the student government invalidated under Title VI, without discussion of whether the student government received fedral funds beyond the "federal financial assistance in the form of grants and contracts" provided to the university generally.) *Cf. Larry P. v. Riles*, 495 F. Supp. 926, 964-66 (N.D. Cal. 1979) (invalidating under Title VI placement and testing procedures of the California State Board of Education and the San Francisco United School District, without discussion of whether the testing or placement process received federal funds beyond the "substantial federal assistance" provided to the school system generally).

otherwise unlawful activities." *Id.* at 1078. But on the larger view, the court said:

> [i]f the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper.

Id. Moreover, the Third Circuit in this case noted that *Finch* did not involve "across-the-board assistance for general educational purposes nor indirect federal financial assistance," 687 F.2d at 698 n.23, so that it was not necessary to go beyond the contours of the specific grants in issue in that case to determine the contours of the programs affected. In this case, general federal financial assistance does flow throughout the school, and so could be used to support discrimination in all of the school's programs or activities.[30]

These cases are consistent with cases on the scope of Title VI decided before Title IX was enacted. *See, e.g., Bossier Parrish School Board v. Lemmon, supra,* and *United States v. Jefferson Country Board of Education, supra.* Moreover, the reasoning of these cases has been confirmed by this Court in *Lau v. Nichols, supra,* in which a school district that received federal funds was prohibited under Title VI from discriminating in the admission or treatment of its students in any aspect of the educational process and not simply in those programs or activities "directly" funded by the federal government.[31]

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[30] *See also Iron Arrow Honor Society v. Heckler,* 702 F.2d 549 (former 5th Cir. 1983), holding that discrimination in an honor society infected the entire university, thereby reaching, by definition, federal funding wherever and however it was received.

[31] *See also Serna v. Portales Municipal Schools, supra,* which follows the approach taken by *Lau.* The *Serna* court viewed the *Lau* decision as interpreting Title VI to require assurance that "students of a particular national origin are not denied the opportunity to obtain the education generally obtained by other students

Nor have cases on the scope of Section 504 limited coverage to programs or activities for which federal assistance was specifically earmarked or expendended. In *United States v. Baylor University Medical Center*, *supra*, the court held that Medicaid and Medicare payments for health services rendered to eligible patients are federal financial assistance to a hospital that brings that hospital under Section 504. In *Garrity v. Gallen*, 522 F. Supp. 171, 212-13 (D.N.H. 1981), the court rejected the defendants' arguments that Section 504 applies "only [to] those specific activities or programs within Laconia State School itself which plaintiffs have proven are sustained by federal funds," noting the "intolerable burden" that would be imposed by an attempt to "identify precisely which federal funds flow to which programs and activities within [the] school." In *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948, 951 (D.N.J. 1980), the court held that "§ 504 is applicable to the interscholastic athletic activities of a school system receiving federal funding even if none of the federal funds are specifically spent on interscholastic athletics." Similarly, in *Wright v. Columbia University*, 520 F. Supp. 789 (E.D. Pa. 1981) the court rejected the university's argument that Section 504 did not cover the athletic program because it received no direct federal funding.[32] Acceptance of such an argument, the court stated, *id.* at 792, would permit federally-funded institutions

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in the system." 499 F.2d at 1153 (emphasis supplied). As a result, the *Serna* court ordered wide-ranging changes in the Portales school district affecting its entire educational program.

[32] *See also Wolff v. South Colonie Central School Dist.*, 534 F. Supp. 758, 761 (N.D.N.Y. 1982). Moreover, a number of cases that have not dealt expressly with the "federal financial assistance" or "program or activity" language of Section 504 have nonetheless treated the statute as having a broad scope. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Caminisch v. University of Texas*, 616 F.d 127, 129 (5th Cir. 1980), *vacated as moot and remanded for trial*, 451 U.S. 390 (1981); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979); *Kamp-*

to dissect themselves, at whim, into discrete entities, to allocate federal dollars into programs which cannot discriminate against handicapped persons, and to free privately obtained funds from those programs and instead to channel such money into programs purportedly immune from Section 504 strictures.

In summary, a wealth of case law under Title IX, Title VI, Section 504, and the Fourteenth Amendment confirms the Third Circuit's conclusion that federal financial assistance to students brings all of a school's programs and activities within Title IX.[33] In introducing Title IX, Senator Bayh explained that he doubted "whether even one institution of higher education today, private or public, is not receiving some Federal assistance". 117 Cong. Rec. 30403 (1971). If student financial aid is excluded, hundreds of such schools would no longer be covered, and the scope and effectiveness of Title IX, Title VI and Section 504 would be severely curtailed.

In addition, if this Court accepts Grove City's position that a program is covered under Title IX only if it re-

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meier v. Nyquist, 553 F.2d 296, 298 n.2 (2d Cir. 1977), *Barnes v. Converse College*, 436 F. Supp. 635, 636-37 (D.S.C. 1977).

[33] The few cases adopting a narrower reading are unpersuasive and provide weak authority for their position. *Hillsdale College v. Department of Health, Education, and Welfare, supra*, was decided by a divided panel with one judge in the majority having died before the judgment was entered, thereby raising a question about the validity of the decision. The other cases were either decided prior to this Court's decision in *North Haven*, not appealed, or since reversed or affirmed on other grounds. *See Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Bennett v. West Texas State Univ.*, 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, No. 81-1398 (5th Cir. Jan. 31, 1983), *modified on rehearing* (Feb. 23, 1983), *pet. for cert. filed*, 51 U.S.L.W. 3775 (Apr. 6, 1983) (No. 82-1683); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983); *Stewart v. New York University*, 430 F. Supp. 1305 (S.D. N.Y. 1976).

ceives money under a federal statute whose funds are specifically earmarked for use in that program, or the *Hillsdale* position that only financial aid, or federal financial aid, is covered, the very purposes of Title IX, Title VI and Section 504 would be defeated. The history department, the athletics program, or the student union, for example, could be conducted in a sex-discriminatory manner with impunity, although all these activities receive and benefit from federal funds, so long as the funds are not specifically earmarked for those uses.

Congress surely did not intend in passing these laws to tolerate a situation in which a student could go from one course to another, from the cafeteria to the study hall, from physical education to French class, and be subjected to discrimination in some programs but not others, depending upon whether the program "directly" receives federal funds.

The student aid Grove City receives flows throughout the College through payment of tuition and costs. Although in the form of student aid, its reach is far broader than the financial aid suggested by the *Hillsdale* court. Grove City may use the tuition payments to support any and all of its activities. This student aid, as recognized by Congress in 1971 and 1972 when it was created, and as underscored by public statements of schools and colleges today, is a vital source of revenue for the schools. Whatever the coverage of an educational institution might be where limited grants or contracts are at issue,[34] the type of funding at issue here, reaching all parts of the school, clearly brings all of Grove City within the confines of Title IX.

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[34] In the case of such contracts and grants, the totality of circumstances, including overhead factors, permissible uses of the funds, and the like, would be relevant to determine coverage, and whether in fact a "financial '[C]hinese wall' " exists. *Grove City College v. Bell*, *supra*, at 701 n.28.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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August 8, 1983

[redacted]

United States Senate

[redacted]

May 3, 1982

Ms. Barbara Hales
719 East 2730 North
Provo, Utah 84604

Dear Ms. Hale:

Since introducing my amendment on Title IX, I have had the time to become more familiar with the problems that Title IX hopes to resolve, and the improvements it has made in opening up opportunities for women in education.

Much of this has been as a result of your personal involvement. You have helped me become more acutely aware of the gains across a wide front which have been made for women in Utah because of Title IX. As you know, I have always supported all efforts which would improve the rights and conditions for women.

My amendment for Title IX (S. 1361) was originally introduced because of my deep conviction that local governments are best able to meet the needs of most citizens. In addition, some private colleges, which refuse to take federal funds directly, appeared to have been improperly harassed by federal bureaucrats. While I continue to feel that Title IX, as enacted, is not perfect and can be improved, since reviewing the progress made because of Title IX and the rational way it has been administered in Utah in the past few years, I am withdrawing my amendment. I will continue to monitor the situation carefully and consider other improvements if they become necessary.

I will also support all reasonable and worthwhile efforts which will improve conditions for women. In this regard, I will appreciate your continued suggestions and support in achieving this goal.

Warmest personal regards.

Orrin G. Hatch
United States Senator

OGH:fr

For Any Response Please Cite File No: 4-001PM.20

Attachment A

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-792

IN THE

Supreme Court of the United States

October Term 1983

GROVE CITY COLLEGE,

Petitioner,

vs.

T.H. BELL, Secretary of the United States Department of Education,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF THE COUNCIL OF COLLEGIATE WOMEN ATHLETIC ADMINISTRATORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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No. 82-792

IN THE

Supreme Court of the United States

October Term 1983

GROVE CITY COLLEGE,

Petitioner,

vs.

T.H. BELL, Secretary of the United States Department of Education,

Respondent.

BRIEF OF THE COUNCIL OF COLLEGIATE WOMEN ATHLETIC ADMINISTRATORS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

With consent of the parties, the Council of Collegiate Women Athletic Administrators ("CCWAA") respectfully submits this brief as amicus curiae in support of the Department of Education.

A. Amicus Curiae Is an Organization of Collegiate Athletic Administrators Who, Because of Their Professional Responsibilities, Are Vitally Concerned About the Applicability of Title IX to the Educational Programs of Colleges and Universities, and Especially Title IX's Applicability to Intercollegiate Athletics.

The Council of Collegiate Women Athletic Administrators is a nonprofit professional organization, organized to provide opportunities for women in athletic administration

to enhance their professional relationships with colleagues and to provide a forum for discussion of issues affecting collegiate athletic programs. CCWAA members are employed by universities and colleges in administrative positions in intercollegiate athletics, and represent approximately 100,000 female athletes. Members are located in all 50 states.

Because of their professional responsibilities, CCWAA members are vitally concerned that Title IX remains available as a tool for eliminating sex discrimination and for enhancing women's opportunities in intercollegiate athletics. For the reasons explained below, CCWAA members are concerned that the opinion of the Court in this case may have an unanticipated impact on the viability of Title IX in cases dealing with sex discrimination in intercollegiate athletics.

B. Although This Case Does Not Directly Involve Intercollegiate Athletics, the Legal Arguments Made by Grove City College Are Identical to Legal Arguments That Have Been Made in Other Title IX Cases Which Have Involved Athletics. As a Result, the Court's Decision in This Case Could Have a Direct — Even if Unintended — Effect on Intercollegiate Athletics.

In three recent cases, Federal District Courts have held that intercollegiate athletics are not covered by Title IX; and all three have used the same reasoning that Grove City College has argued in this case: that the Title IX regulations are invalid where the Department of Education[1] seeks to

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[1]To avoid confusion, the Department of Health, Education and Welfare, whose Title IX functions were transferred to the Department of Education in 1979, and the Department of Education both will be referred to in this brief as the "Department."

prohibit discrimination by indirect beneficiaries of federal financial aid or in specific programs that do not receive direct federal financial assistance.

In *Othen v. Ann Arbor School Bd.*, 507 F.Supp. 1376 (E.D. Mich. 1981), the court held that Title IX extends only to programs which receive direct financial assistance; and thus, Department regulations bringing athletics within the scope of Title IX are invalid when applied to athletic programs which do not receive direct federal financial assistance.

In *Bennett v. West Texas State University*, 525 F.Supp. 77 (N.D. Texas 1981), the court held that Title IX applies only to specific programs or activities which receive direct federal financial assistance; and thus, indirect aid received by state university athletic programs does not bring them within the ambit of Title IX.

And in *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D. Va. 1982), the court held that the Department has no authority to investigate and regulate athletic programs which have not received direct federal financial assistance.

Although the case now before this Court involves federal financial aid to students — and not intercollegiate athletics — if the Court accepts Grove City College's argument and renders a broadly-worded decision, more than a decade of painstaking progress in eliminating sex discrimination in intercollegiate athletics could be severely if not fatally undermined. This is so because a broadly-worded decision favoring Grove City College would encourage more lower courts to rule that all indirect beneficiaries of federal financial aid, including intercollegiate athletic programs, are outside the scope of Title IX. For the following reasons, such rulings would be in error insofar as intercollegiate athletics are concerned.

ARGUMENT.

I.

AMICUS CURIAE ENDORSES THE POSITION OF THE DEPARTMENT OF EDUCATION, AND URGES THE COURT TO AFFIRM THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN THIS CASE ON THE GROUNDS STATED BY THAT COURT.

Amicus Curiae files this brief only in what may turn out to be an excess of concern. The CCWAA endorses the position of the Department of Education and urges this Court to affirm the decision of the Third Circuit Court of Appeals.

Indeed, if this Court does affirm the Third Circuit, and does so on the grounds stated by that court, it appears that the concerns of the CCWAA will have been satisfied. This is so, because in *Haffner v. Temple University*, 688 F.2d 14 (3d Cir. 1982), a separate panel of the Third Circuit relied on the ruling below in *Grove City* in holding that Title IX *does* apply to the intercollegiate athletic program at Temple University, even though that program does not receive direct, earmarked federal funds.

The specific result in *Haffner v. Temple University* is the one desired by the CCWAA, and is one which the CCWAA wants to assure is not impliedly overturned by the Court's decision in this case.

II.

IF THE COURT CONCLUDES THAT IT MUST REVERSE THE DEPARTMENT'S VICTORY IN THE THIRD CIRCUIT, AMICUS CURIAE URGES THIS COURT TO NOTE THAT THE STATUS OF INTERCOLLEGIATE ATHLETICS UNDER TITLE IX DIFFERS FROM THAT OF THE STUDENT FINANCIAL AID PROGRAM AT ISSUE IN THIS CASE; AND THUS AMICUS CURIAE URGES THE COURT TO RULE EXPRESSLY THAT ITS DECISION HERE SHOULD NOT BE INTERPRETED TO MEAN THAT TITLE IX IS INAPPLICABLE TO COLLEGIATE ATHLETIC PROGRAMS.

A. The Legislative History of Title IX Clearly Indicates That Congress Intended Title IX to Apply to Intercollegiate Athletics, Even Though Collegiate Athletic Programs Themselves Do Not Receive Direct Federal Financial Assistance.

As the court below noted, Title IX was specifically designed to fill the gap left by Title VI, which did not prohibit discrimination based on sex. *Grove City College v. Bell*, 687 F.2d 684, 691 (3d Cir. 1982). The overriding objective of Congress clearly was to withhold public funds from institutions which engage in sex discrimination. This Court itself recognized in *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), that Title IX, like Title VI, was designed "to avoid the use of federal resources to support discriminatory practices. . . ." The reach of Title IX was intended to extend as far as all recipients of federal aid who practice sex discrimination.

Not long after Title IX was enacted, it became apparent to Congress that the Department interpreted Title IX to apply to *institutions* that receive federal financial assistance, not merely to particular programs within those institutions. The Department's interpretation was the basis on which it issued proposed regulations dealing with athletics in particular, even though collegiate athletic programs do not receive direct federal financial assistance.

The Department's interpretation of Title IX displeased some members of Congress, especially Senator John Tower of Texas. As a result, Senator Tower introduced a proposed amendment, Amend. 1343 to S. 1539, 120 Cong. Rec. 15322 (1974), to Title IX which would have exempted "revenue producing" sports from Title IX's coverage. Senator Tower's proposed amendment was killed in Conference. In

its place, the Conference Committee substituted an amendment directing the Department to prepare regulations implementing the provisions of Title IX which were to include ". . . with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Section 844 of the Education Amendments of 1974, Pub.L.No. 93-380, §844, 88 Stat. 612 ("Javits Amendment").

At the same time Congress expressly directed the Department to draft Title IX regulations for athletics, Congress amended Title IX to specifically exclude social fraternities and sororities, Boy Scouts, Girl Scouts, Camp Fire Girls, Young Men's and Women's Christian Associations and other voluntary youth service organizations traditionally open to members of one sex from Title IX coverage. (20 U.S.C. §1681(a)(6)) Furthermore, in 1976 Congress specifically excluded American Legion activities, Boys and Girls State and Nation programs, father-son and mother-daughter activities and beauty pageant scholarships from Title IX coverage. (20 U.S.C. §1681(a)(7)-(9))

These legislative initiatives show a direct and intense involvement by Congress in planning the scope of Title IX. And such specific inclusions and exclusions by Congress demonstrate that Congress clearly intended Title IX to encompass intercollegiate athletic programs.

B. In Response to the Statutory Mandate of Congress, the Department of Education Promulgated Detailed Regulations Prohibiting Sex Discrimination in Intercollegiate Athletics.

As required by Title IX generally, the Department drafted a comprehensive set of regulations governing the conduct of federally-assisted schools in a number of areas. (45 C.F.R. §§86.1-71) One section was drafted in response to the Javits

Amendment in particular, and it pertains specifically and exclusively to athletics. (45 C.F.R. §86.41)

The athletics regulations provide generally that all intercollegiate athletes, regardless of sex, shall be treated equally. (§86.41(a))

Insofar as the organization of teams is concerned, the regulations provide that separate teams may be set up for each sex but only where sex-separation occurs as a result of competitive skill differences or where the sport is a bodily "contact" sport. (However, where there is no team for the excluded sex in a particular sport, members of that sex must be allowed to try-out for the team, unless the sport is a contact sport.) (§86.41(b))

Most importantly, the regulations list ten "factors" that are to be used in evaluating whether equal opportunity for both sexes does in fact exist:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services; and

(x) Publicity.

(§86.41(c)) This section also provides that unequal aggregate expenditures alone will not constitute noncompliance, although failure to provide funds for teams for one sex may be considered.

Finally, the regulations gave colleges an adjustment period of three years to bring themselves into compliance with the regulations.

C. After President Ford Approved the Title IX Regulations, Congress Reviewed the Intercollegiate Athletics Sections in Particular and Indicated Its Own Approval of Their Specifics by Failing to Veto Them as Congress Then Could Have Done.

After the Department submitted its final regulations to Congress in 1975, Congress held six days of hearings to review and veto them if it so chose. This was done pursuant to §431(a)(1) of the General Education Provisions Act, Pub.L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. §1232(d)(1), which gave Congress an opportunity to examine the Department's regulations for consistency with Title IX and to disapprove them by concurrent resolution. If no such resolution were passed by Congress, the Act provided that the regulations automatically would go into effect 45 days after submission to Congress. (Although Congress has since amended 20 U.S.C. §1232(d)(1) so that Congressional inaction is no longer a presumption of approval by Congress or the consistency of the regulations with the Act, this amendment was not passed until five months after the Department submitted the final 1975 regulations to Congress. Pub.L.No. 94-142, §§7(a), (b), 89 Stat. 796 (1975), codified at 20 U.S.C. §1232(d)(1).)

The testimony of 30 witnesses, plus 132 additional statements, comprising 664 pages were before the House Subcommittee on Postsecondary Education. The majority of

witnesses focused on the issue pertinent here: the meaning of "receiving Federal financial assistance" in the context of intercollegiate athletics. Hearings on Title IX Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 97 (1975). Yet, after lengthy debate, Congress did *not* reject the regulations.

Congress' failure to reject the athletics portion of the regulations is further proof that Congress intended Title IX to apply to athletics. This is so, because, as this Court said in *North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982):

> Although postenactment developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX. . . ." Where "an agency's statutory construction has been fully brought to the attention of the public and the Congress," and the latter has not sought to alter the interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

The Department's regulations concerning intercollegiate athletics meet the *North Haven* test.

D. The Student Financial Aid Programs Which Are Directly at Issue in This Case Did Not Receive the Unique and Intense Scrutiny Which Congress Gave to Intercollegiate Athletics; and Thus, if Necessary, It Would Be Perfectly Consistent for This Court to Indicate That Title IX Does Apply to Collegiate Athletic Programs Even if the Court Must Rule That Title IX Does Not Apply to Student Financial Aid Programs.

The indirect receipt of federal financial student aid which is at issue in this case has its own history under Title IX and the Department's regulations, separate and distinct from that of intercollegiate athletics.

Admittedly, there is similarity between the legislative histories behind the Department's treatment of the indirect student aid at issue in this case and its treatment of intercollegiate athletics. There is, for example, legislative history supporting the Department's view that indirect aid to a school's students brings that school within the scope of Title IX. This legislative history was detailed by the Court of Appeals in its decision in this case. (687 F.2d at 691-695) And some of that history parallels the legislative history of the athletics regulations set forth above in this brief.

The CCWAA believes that this legislative history establishes that the decision below in this case is correct. If however, this Court concludes otherwise, it must be emphasized that Congress went further with respect to intercollegiate athletics than it did with respect to student aid.

As noted above, where athletics were concerned, Congress did more than reject attempts — such as the Tower Amendment — to limit Title IX's applicability to athletics. Congress affirmatively adopted the Javits Amendment, and in so doing, statutorily directed the Department to adopt Title IX regulations dealing with athletics. Thus, there can be no question that Title IX is applicable to athletics, whatever this Court's conclusion about its applicability to indirect student aid.

III.

TITLE IX HAS BEEN INSTRUMENTAL IN THE PROGRESS THAT HAS BEEN MADE IN REDUCING SEX DISCRIMINATION IN COLLEGIATE ATHLETICS; AND ANY RULING BY THIS COURT THAT IS INTERPRETED TO EXEMPT ATHLETICS FROM TITLE IX WILL IMMEDIATELY REVERSE MUCH IF NOT ALL OF THAT PROGRESS.

A. Prior to the Enactment of Title IX in 1972, Participation by Women in Intercollegiate Athletics Was Only a Fraction of What It Is Today.

Title IX was enacted in response to the growing awareness of sex discrimination in the nation's educational institutions.

By 1972, many people had begun to recognize the significant role athletics play in perpetuating inequality based on sex. Sports have reflected and perpetuated sexual stereotypes; and sports have been a primary form of socialization that perpetuate a male-dominated society. For a very long time, women's most socially acceptable role in sports has been in cheerleader-types of activities, which train women to stand decoratively on the sidelines, cheering on the men. Athletics develop aggressiveness, leadership, self-confidence and other traits long believed inappropriate for women. Comment, *Sex Discrimination — Title IX of the Education Amendments of 1972 Prohibits All-Female Teams in Sports not Previously Dominated by Males*, 14 Suffolk University Law Review 1471, 1474 n. 18 (1980).

The enactment of Title IX in 1972 did much to change these outmoded attitudes. Among other things, it significantly enhanced the opportunity for women to participate in intercollegiate athletics. As a result, there has been a dramatic increase in the number of college women who do participate in sports. Comment, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 Golden Gate University Law Review 759, 761-762 (1981).

B. Title IX Prodded Colleges and Universities Into Responding to the Interests and Desires of Women Athletes, and the Progress That Has Been Made in Reducing Sex Discrimination in Athletics Is Traceable Directly to the Adoption of Title IX.

Never in the history of intercollegiate athletics has such rapid progress been made for women than in the 1972-1982 decade following the enactment of Title IX.

According to unpublished estimates prepared by the National Collegiate Athletic Association ("NCAA") and distributed to its members, NCAA member universities spent an average of $1.2 million on their men's athletic programs

and an average of $27,000 on their women's athletic programs in 1973-74. By 1981-82, the average expenditure for the men's programs was an estimated $1.7 million and for women's programs, an estimated $400,000.

NCAA member institutions spent more than $770 million on all of their athletic programs in 1980-81, an increase of 75% since a similar study was conducted in 1976. According to the NCAA, the expansion of *women's* programs was cited by the universities as the most significant factor in increased expenses.

Additionally, according to figures compiled by the NCAA, in 1971-72, there were fewer than 32,000 female student athletes participating in all NCAA schools; but by 1981-82, this number had jumped to more than 72,000.

In addition to the explosive growth of female participation in sports, 786 new coaching positions opened up for women's teams at 335 schools between 1974 and 1979. The number of collegiate female athletic trainers increased from 1 in 1974 to 14 in 1979. And there has been a dramatic expansion in athletic administration programs that train students for careers in sports, including sports communications, sports education, sports management and sports medicine.

Much of this progress, as well as prospects for future growth, is dependant upon an effective Title IX that will be consistently enforced to assure full equality to women. This Court itself recognized this need in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), when it determined that Title IX created a private cause of action for victims of sex discrimination in educational programs.

C. The Title IX Regulations Provide Invaluable, Specific Guidance Concerning the Particular Actions Colleges and Universities Must Take to Reduce Sex Discrimination in Athletics.

As noted above, the Department's regulations pertaining to intercollegiate athletics specify ten factors that should be considered in determining whether equal opportunities have

been made available to male and female student athletes. These ten factors are the most important equal opportunity issues facing women's intercollegiate athletics today. Thus, the regulations provide especially important guidance for colleges and universities and for the courts as well.

In *Haffer v. Temple University*, 688 F.2d 14 (3d Cir. 1982), for example, the plaintiffs (who were women student athletes) charged that Temple University's intercollegiate athletic program violated all ten of the regulations' anti-discrimination factors (45 C.F.R. §86.41(c)). The Third Circuit upheld the District Court's ruling that Title IX applies to athletics, and it remanded the case for trial where the regulations were available to guide the District Court. If the ten anti-discrimination factors had not been specified in the regulations, the plaintiffs and the court in *Haffer* would have had to litigate a definition of "equal opportunity" in the context of athletics, as well as decide whether it had been denied. This obviously would have been a far more time-consuming and difficult task to perform than simply determining whether — as a matter of fact — Temple University failed to comply with the requirements of the regulations' ten factors.

D. If the Ruling of the Court in This Case Is Interpreted to Mean That Title IX Does Not Apply to Athletics, the Discrimination Claims of Women Athletes Will Have to be Litigated Under the Broad Mandate of the Equal Protection Clause, Thus Making Every Such Discrimination Claim a Cumbersome Constitutional Law Case Instead of a More Manageable Exercise in the Interpretation of Specific Regulations.

The practical utility of the regulations cannot be overstated, and can be illustrated with but a single observation. Before this Court decided *Cannon v. University of Chicago*,

and thus made clear that injured parties may bring their own private causes of action under Title IX, more than a dozen sex discrimination in athletics lawsuits were filed under the Equal Protection Clause of the 14th Amendment or state equal rights amendments where they existed. Virtually all of those cases litigated but a single issue: when, if ever, may a woman play on the same team with, or against, a man, and vice versa.[2]

To be sure, every facet of this intriguing question was explored, under every conceivable set of circumstances. The cases considered this single issue when contact sports were involved and when non-contact sports were involved.[3] The

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[2]*See, e.g.: Hoover v. Meiklejohn*, 430 F.Supp. 164, 170 (D. Colo. 1977) (providing interscholastic soccer for boys while excluding girls violates equal protection); *Gilpin v. Kansas State High School Activities Ass'n, Inc.*, 377 F.Supp. 1233, 1238 (D. Kan. 1973) (state may not prohibit girls from participating on only interscholastic cross-country team available); *Reed v. Nebraska School Activities Ass'n*, 341 F.Supp. 258, 261 (D. Neb. 1972) (offering teams for boys while excluding girls violates equal protection). *But see: Ritacco v. Norwin School Dist.*, 361 F.Supp. 930, 932 (W.D. Pa. 1973) (girls denied access to boys' tennis team); *Bucha v. Illinois High School Ass'n*, 351 F.Supp. 69, 75 (N.D. Ill. 1972) (girl denied access to boys' swim team); *Hollander v. Connecticut Interscholastic Athletic Conference, Inc.*, Civil No. 12-49-27 (Conn. Super. Cit., New Haven County, Mar. 29, 1971) (girl denied access to boys' track team), appeal dismissed mem., 164 Conn. 658, 295 A.2d 671 (1972).

[3]*See, e.g.: Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207, 1209 (6th Cir. 1973) (court modified lower court injunction permitting female athletes to participate on male teams by limiting it to noncontact sports); *Gilpin v. Kansas High School Activities Ass'n, Inc.*, 377 F.Supp. 1233, 1236 (D. Kan. 1973) (girls permitted to compete on all-male cross-country running team but not in contact sports). Courts have distinguished between contact and non-contact sports, fearing that female athletes competing with males in athletic contests involving frequent and often violent physical contact face a serious risk of injury. *See: Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 350-51 (1st Cir. 1975) (court rejected contact sport rationale as applied to 8-12 year-olds but reserved question of applicability to teenagers, where risk of injury greater); *Magill v. Avonworth Baseball Conference*, 364 F.Supp. 1212, 1216 (W.D. Pa. 1973) (exclusion of girls from contact sport of youth baseball permissible because girls endangered by competing against boys), *aff'd*, 516 F.2d 1328 (3rd Cir. 1975) (basis for

significance of an existing women's team was weighed and compared with the absence of a team for women.[4] And in some cases, the higher level of scrutiny demanded by state equal rights amendments was measured against the scrutiny level demanded by the 14th Amendment alone.[5]

While the significance of Equal Protection litigation to women's athletics has been valuable and undeniable, the issue of women's right to access to previously all-male teams is now fairly well settled. Moreover, as a practical matter, the more subtle issues addressed by the Title IX regulations' ten anti-discrimination factors are far more important to women athletes today than whether or under what circumstances they may play on men's teams. Yet none of the Equal Protection cases referred to above dealt with those more subtle issues.

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excluding girls from boys' football team is probability of injury to girls). A number of cases, however, have refused to recognize this distinction as adequate grounds for denying female athletes the chance to participate in sports offered to males. *See, e.g.: Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F.Supp. 1117, 1122 (E.D. Wis. 1978) (risk of injury does not justify exclusion of girls from activities offered to boys); *Carnes v. Tennessee Secondary School Athletic Ass'n*, 415 F.Supp. 569, 571 (E.D. Tenn. 1976) (safety argument insufficient to exclude girls from contact sport because frail boys not excluded); *Darrin v. Gould*, 85 Wash.2d 859, 876, 540 P.2d 882, 892 (1975) (exclusion of girls from football for safety reasons impermissible because boys also face risk of injury).

[4]*See, e.g.: Brenden v. Independent School Dist.*, 477 F.2d 1292, 1295 (8th Cir. 1973) (court reserved question of separate-but-equal teams and noted case involved absence of separate team); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F.Supp. 1117, 1122 (E.D. Wis. 1978) (schools may not completely deny girls opportunity to participate in sport offered to boys); *Hoover v. Meiklejohn*, 430 F.Supp. 164, 169-70 (D. Colo. 1977) (complete denial to girls of opportunity to compete in sports offered to boys violates equal protection); *Carnes v. Tennessee Secondary School Athletic Ass'n*, 415 F.Supp. 569, 571 (E.D. Tenn. 1976) (no justification exists for denying girls any opportunity to participate in sports open to boys).

[5]*See, e.g.: Darrin v. Gould*, 85 Wash.2d 859, 540 P.2d 882 (1975) (Washington Equal Rights Amendment requires that girls be permitted to try out for football).

If the decision of this Court is interpreted to mean that Title IX does not apply to athletics, the regulations will have no force as law at all. As a result, the ten issues addressed by the regulations will have to be litigated under the 14th Amendment — a prospect which raises the specter of years of Constitutional litigation and literally dozens of cases. For this reason, the efficiency of the Title IX regulations is clear; and the CCWAA urges this Court not to do anything that may call into question the validity of those regulations.

CONCLUSION.

For all of the foregoing reasons, CCWAA as amicus curiae respectfully urges the Court to affirm the decision of the Third Circuit Court of Appeals.

If, however, the Court is unable to affirm, then the CCWAA respectfully urges the Court to expressly indicate that its decision in this case should *not* be interpreted to mean that Title IX is inapplicable to intercollegiate athletics.

Respectfully submitted,

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T. H. BELL, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-792

GROVE CITY COLLEGE, *et al.*,

v. *Petitioners,*

T. H. BELL, *et al.*,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Opportunity Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscrim-

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[1] The consents of all parties have been filed with the Clerk of the Court.

inatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Although most of EEAC's members are not directly subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), the Court's decision in this case can be expected to bear importantly on employers such as EEAC's members that are subject to other similar statutory provisions. For example, many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504)—a statute which, like Title IX was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Thus, in *Le-Strange v. Consolidated Rail Corporation*, 687 F.2d 767 (3d Cir. 1982), No. 82-862, *pet. for cert. granted*—a case concerning the jurisdictional scope of Section 504 relative to employment—Judge Adams' concurring opinion states that the result was compelled, in part, by the Third Circuit's decision in the instant matter in which:

> . . . [T]his court concluded that an entire educational institution is brought within the definition of "program," and therefore subject to regulation under Title IX, if it receives any fed-

> eral aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution.

687 F.2d at 777. Accordingly, EEAC's members have a substantial interest in the issue presented here for the Court's consideration; that is, whether Title IX applies to a college which receives no direct federal financial assistance for any program or activity and, if so, whether the institution's entire operations or only those specific programs in which the beneficiaries of federal financial assistance participate are subject to Title IX.[2]

STATEMENT OF THE CASE

The Department of Health, Education, and Welfare (HEW) seeks to terminate federal grants and guaranteed loans to students attending Grove City College because of the College's failure to execute HEW's Assurance of Compliance Form.[3] The form required the College to acknowledge that it was operating federally funded educational programs and was therefore subject to all regulations implementing

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[2] Because of its interest in issues arising out of Title IX and Section 504, EEAC filed briefs as Amicus Curiae in the Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *University of Texas v. Camenisch*, 101 S. Ct. 1830 (1981); *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982); and *Consolidated Rail Corporation v. LeStrange*, No. 82-862, *pet. for cert. granted.*

[3] HEW's functions under Title IX were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. For purposes of editorial simplicity, this brief will refer to HEW throughout since the relevant actions were taken by HEW prior to the reorganization.

Title IX. Because the College received no direct federal assistance of any kind to operate programs or activities, it refused to complete the form. Following a hearing, an HEW administrative law judge (ALJ) found the College to be out of compliance with HEW's Title IX regulations solely because of its refusal to execute the Assurance.[4] Accordingly, the ALJ ordered termination of the student's grants and loans in 1978.

The College and several affected students initiated a lawsuit seeking judicial review of the ALJ's decision and order. The district court granted the plaintiff's motion for summary judgment, holding that HEW could not terminate federal assistance to the students because the College refused to sign the Assurance of Compliance. Although the trial court found that the student aid constituted federal financial assistance within the meaning of Title IX, it held, *inter alia*: (1) Title IX does not provide enforcement authority to "contract[s] of insurance or guarantee"; and (2) Title IX only permits termination upon an actual finding of sex discrimination. HEW appealed the district court's decision.

The Third Circuit agreed with the trial court that Grove City was a recipient of federal financial assistance even though it received no direct federal monies, but reversed the district court in all other respects. In relevant part, the appellate court held that the receipt of federal grants and loans and their subsequent payment to Grove City rendered the Col-

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[4] At the time of the decision of the trial court, HEW's Title IX regulations appeared at 45 C.F.R. Part 86. They were recodified in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802 (May 9, 1980), and are now found at 34 C.F.R. Part 106.

lege subject to Title IX as a recipient of federal financial assistance. It concluded that Section 901(a) of Title IX encompassed "*all* forms of federal aid to education, direct or indirect." Pet. App. A-11 (emphasis in original). Contrary to the holdings of several other courts, the Third Circuit also held that the mere receipt by students of federal funds thereby subjected the entire college to Title IX. In doing so, it specifically rejected Grove City's argument that upholding HEW's jurisdiction in this case is incompatible with the explicit program-specific limitation contained in Title IX.

SUMMARY OF ARGUMENT

The Third Circuit construed Title IX to provide HEW with regulatory and enforcement authority to terminate federal grants and loans to students in circumstances in which the educational institution did not apply for federal funds and had no role in the use or distribution of unearmarked federal funds to the intended student beneficiaries. The appellate court was incorrect for several reasons. First, the language of Section 901(a) of Title IX, 20 U.S.C. § 1681(a), is limited to the disbursement of federal funds to intended beneficiaries participating in the federally supported programs. *Cannon v. University of Chicago*, 441 U.S. 677, 690-693 (1979). Second, application of the Department of Health, Education, and Welfare's (HEW) Assurance requirement and termination of all student grants and loans because of the Petitioners' failure to fulfill the requirement, violates the program specific scope of Section 901 and the pinpoint termination procedures of Section 902. Third, Congress understood when it enacted Title IX that its nondiscrimination provisions did not apply to direct payments to students from the federal government.

Finally, this Court in *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982), made clear that HEW's regulatory and enforcement authority were program specific. Thus, the policies underlying Title IX require that HEW ascertain which programs administered by the recipient for the benefit of students received direct federal assistance and that HEW limit its enforcement authority to those programs.

ARGUMENT

ENFORCEMENT OF HEW'S ASSURANCE FORM REQUIREMENT AGAINST AN INSTITUTION WHICH NEITHER SEEKS NOR RECEIVES DIRECT FEDERAL FINANCIAL ASSISTANCE BY TERMINATING ALL LOANS AND GRANTS TO STUDENTS IS IN EXCESS OF HEW'S AUTHORITY BECAUSE IT IS INCONSISTENT WITH TITLE IX'S PROGRAM SPECIFIC SCOPE, ITS PINPOINT TERMINATION PROVISIONS AND THE DECISIONS OF THIS COURT.

A. The Language of Title IX Expressly Limits the Statute's Application to those Specific Programs Receiving Financial Assistance.

Title IX applies only to those educational programs or activities that receive direct federal assistance. Although written broadly, Section 901(a), 20 U.S.C. § 1681, addresses itself only to sex discrimination against the participants and the beneficiaries of federally assisted programs. The discrimination prohibition is stated unequivocally and unambiguously:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance* . . . . (Emphasis added.)

The wording chosen by Congress makes unmistakably explicit that Section 901 is designed to protect from sex discrimination only those persons for whose benefit the federally funded programs are established. *Cannon v. University of Chicago*, 441 U.S. 677, 691-693 (1979); *Brunswick School Board v. Califano*, 449 F. Supp. 866, 870 (D. Maine 1978), *aff'd sub nom. Isleboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1031 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

Title IX's enabling provision—Section 902, 20 U.S.C. § 1682—limits the agency's authority to promulgate rules, regulations, or orders to those programs receiving federal financial assistance. It provides in relevant part that:

> Each Federal department . . . which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders . . . . (Emphasis added.)

The program-specific scope of Title IX is further reinforced in Section 902 by its enforcement provision which is limited to particular programs or activities that receive federal aid. That is:

> [S]uch termination or refusal shall be limited to the particular political entity, or part thereof . . . and shall be *limited in its effect to the particular program or part thereof, in which such noncompliance has been found.* (Emphasis added.)

The clear program specific focus of Title IX, as supported by its legislative history, has been recognized by this Court. Thus, in *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912, 1926 (1982), the Court concluded that: "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902."

Contrary to several other federal courts of appeals and district courts,[5] the Third Circuit misapplied this Court's unambiguous holding in *North Haven* that a federal agency's regulatory and enforcement authority is program specific. The appellate court erred for two reasons. First, it misconstrued the legislative history leading to the enactment of Title IX and applied an "institutional" rather than "program specific" approach to HEW's regulatory and enforcement authority. Pet. App. A-13 to A-15. By adopting this faulty analysis, the appellate court erroneously concluded that "as we construe the legislative history it is consistent with the Department's position that Title IX applied to any institution which receives indirect or direct federal financial assistance." Pet. App. A-15. Second, it repeats its first error and misreads this Court's decision in *North Haven* as "im-

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[5] *See Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982); *Dougherty City School System v. Bell*, 30 FEP Cases 1307 (5th Cir. 1982); *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1981); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Bennett v. West Texas State University*, 525 F. Supp. 77 (N.D. Tex. 1981), 81-1398 (5th Cir., January 31, 1983) (unpublished), *pet. for cert. pending*, No. 82-1683; *Otnen v. Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983).

plicitly adopting an institutional approach to the concept of program." Pet. App. A-25 (footnote omitted). By doing so, it broadly interprets program to mean "an entire integrated institution where indirect, unearmarked funding is involved." Pet. App. A-28.

In sum, the effect of the Third Circuit's decision is to contravene the clear intent of Congress, as interpreted by this Court, that Title IX's regulatory and enforcement authority to eliminate sex discrimination in federally funded program is program specific. *See University of Richmond v. Bell*, 543 F.2d 321, 329 (E.D. Va. 1982) ("Were the Court to adopt Plaintiff's argument [that unearmarked student aid constitutes a direct benefit to athletic programs], the programmatic instruction of Title IX would be rendered nugatory, because every program activity at the university would be subject to Title IX.").

B. The Legislative History of Title IX Confirms that Congress Intended to Utilize a "Programmatic" Rather Than "Institutional" Approach to Regulation and Enforcement of Title IX

As this Court recognized in *Cannon v. University of Chicago*, 441 U.S. 677, 694 & n.16 (1979), Title IX was modeled after Title VI. The description of the benefited class in Section 901 of Title IX is identical to that in Section 601 of Title VI, 42 U.S.C. § 2000d, except that the word "sex" is substituted for the words "race, color, or national origin" found in Title VI. *Id.* Both statutes described the scope of their nondiscrimination provisions to be to "any . . . program or activity receiving federal financial assistance." *Compare* 20 U.S.C. § 1681(a) *with* 42 U.S.C. § 2000d. Neither defines "program or activity", but Section 901(c), 20 U.S.C. § 1681(c), defines "educational institution" as:

> [A]ny public or private preschool, elementary, or secondary school, or any institution of vocational professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units such term means each such school, college, or department.

Thus, under Title IX, subunits of a college or university may be regarded as an "institution" if they are administratively separate units. Finally, Title VI and Title IX adopt the same administrative scheme for terminating federal financial assistance "in the particular program [or activity], or part thereof" in which discrimination against intended beneficiaries by the recipient institution occurs. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1.

As this Court observed in *North Haven*, 102 S. Ct. at 1919 & n.13, Title IX evolved as a result of two different proposals by Senator Bayh. The first, introduced in August 1971 as S.659, 92d Cong., 1st Sess., was substantially different from Title IX as enacted. Although Senator Bayh stated that "[t]hese provisions are identical to those provided under Title VI of the 1964 Civil Rights Act," (117 Cong. Rec. 30156), a comparison of his amendment and Title VI shows that the scope of his proposal was institutional rather than program specific, and unlike Title VI, the proposal contained no pinpoint termination provision.[6] In relevant part, S.659 provided:

> No person in the United States shall, on the ground of sex, be excluded from participation

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[6] *Compare* 20 U.S.C. § 2000d-1 *et seq.* with S.659 at 117 Cong. Rec. 30404 (1971).

> in, be denied the benefits of or be subject to discrimination under any program or activity conducted *by a public institution* of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity .... (Emphasis added.)

Subsequently, Senator Bayh made a second proposal in February 1972 that conformed his first proposal to H.R. 7248, which was a marked up version of Title VI. Thus, while the language of Senator Bayh's first proposal deviated from the actual wording of Title VI's, his second amendment, like the House bill, was identical to the first three sections of Title VI, which have a program specific scope.

The Third Circuit, however, failed to recognize the differences between Senator Bayh's first and second proposals. Accordingly, the appellate court's reliance on the legislative history associated with Senator Bayh's first proposal to support its conclusions that Congress intended (1) that Title IX encompass indirect financial assistance and (2) that Title IX provides authority to withhold all direct or indirect financial assistance to discriminating institutions because the entire institution is automatically the funded program, are ill-founded.[7]

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[7] Furthermore, the court of appeals' conclusion that Congress intended indirect federal assistance to be within the scope of Title IX, as shown by the failure of Congress to adopt bills and amendments specifically designed to limit Title IX to direct financial assistance, is equally erroneous. Likewise, the failure of Congress to disapprove HEW's Title IX regulations should not be taken as any indication of their validity. Thus, 20 U.S.C. § 1232 expressly provides that failure of Congress to disapprove regulations promulgated by

This construction of the program specific scope of Title IX is confirmed by the legislative history of Title VI, from which the "program and activity" language is derived.[8] During the debates on the 1964 Civil Rights Act, concern was continually expressed that Title VI would permit intervention into every aspect of the operations of recipients. In response to those concerns, Title VI was redrafted to make it program specific, and the floor statements in both Houses confirm this intent.[9] It was clearly understood that "recipient of the grant is the one in charge of the program or activity . . . [and] [i]t is the program that is administered that would be cut off."[10]

HEW is not evidence of approval and creates no presumption of validity. Moreover, whereas Title IX was considered and voted on by the entire Congress, hearings before a committee of Congress reviewing regulations hardly constitutes a statement of Congress' intent when it enacted Title IX. *Cf. Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978) (Repeal of acts of Congress by implication are not favored especially where such an implication is based on committee inaction).

[8] As stated above, Title VI and Title IX use the same words in Sections 601 and 901 to describe their coverage. Since the words used are derived from Title VI, their meaning as reflected in Title VI's legislative history is relevant in determining its scope and meaning of Section 901. *See Cannon*, 441 U.S. at 694 n.16 ('The genesis of Title IX also bears out its kinship with Title VI").

[9] *See* 110 Cong. Rec. at 1518-19, 21 (remarks of Rep. Celler; *id.* at 1542 (remarks of Rep. Lindsay); *id.* at 1602 (remarks of Rep. Mathias); *id.* at 2480-81 (remarks of Rep. Ryan); *id.* at 6545 (remarks of Sen. Humphrey); and *id.* at 7060 (remarks of Sen. Pastore).

[10] Hearings Before the House Committee on Rules, 88th Cong., 2d Sess. (1964) at 141 (remarks of Rep. Celler); *see also id.* at 142-144, 197-198 (remarks of Rep. Celler).

Moreover, in response to a request from Representative Celler, chairman of the House Judiciary Committee, concerning a list of programs and activities involving federal financial assistance within the scope of H.R. 7152 (which was later given greater specificity in section 601 of the Dirksen-Mansfield substitute), Deputy Attorney General Katzenbach stated:

> A number of programs administered by federal agencies involve direct payments to individuals possessing a certain status . . . . [T]o the extent that there is financial assistance . . . *the assistance is to an individual and not to a "program or activity" as required by Title IX.*[11]
>
> * * * *
>
> The impact of Title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, Title VI *will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply.*[12]

This understanding that Title VI did not include direct payments to individuals was reaffirmed by Senator Ribicoff, one of two authors of the version of Title VI passed by the House of Representatives:

> The individual who receives a direct payment has a right. It is nothing to do with Federal assistance to the individual, but a direct pay-

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[11] *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (letter from Deputy Attorney General Katzenbach to Rep. Celler) at 2773.

[12] *Id.* at 2774.

> ment. Direct payments are not covered in any way by Title VI .

110 Cong. Rec. 8424 (1964). *See also id.* at 8426 (remarks of Sen. Ribicoff).

Witnesses testifying during the hearings on HEW's Title IX regulations also understood that "program or activity" was limited to the direct beneficiaries of programs funded under specific grant statutes.[13] More significantly, however, as previously noted, Senator Bayh's first Title IX proposal contained an institutional rather than program specific approach and would have applied to "any" program or activity of an educational institution receiving federal funds. Had the Senate adopted such an institutional approach, then there might be some justification for the decision reached by the court below. In revising his bill to conform to the House version of Title IX, however, Senator Bayh narrowed his proposal so as to adopt the program specific language found in Title VI and the House bill. Moreover, Senator Bayh understood that even with respect to his first proposal that Title IX would not apply to direct payments to students:

> It is unquestionable in my judgment, that this would not be directed at specific assistance that was received by individual students . . . .

117 Cong. Rec. 30408 (1971).[14]

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[13] *See, e.g., House Title IX Hearings* at 645-61 (Testimony of Dr. Peter Muirhead on behalf of HEW).

[14] *See also Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. 183 (1975).

That Congress did not intend to apply Title IX in circumstances in which the student received the federal assistance directly from the federal government is logical. The purpose of Title IX is to protect women who are the intended beneficiaries in federally assisted programs or activities. As the legislative history for Title VI shows, Congress has consistently used the words "program" and "activity" to designate those projects that are federally funded under specific statutory authority such as federal education grant statutes. For example, Title I of the Elementary and Secondary Education Act, 20 U.S.C. § 241a-m, of 1965—the largest program of federal assistance below the college level—provides payments shall be made only "for programs and projects . . . designed to meet special educational needs of educationally deprived children." [15] It is the beneficiaries of such grant programs that Title IX is designed to protect from discriminatory practices of educational institutions directly receiving such funds. Where, as here, a college does not directly receive federal assistance and thereby has no role in distributing the federal funds to the student beneficiaries, there is no program or activity within the meaning of Title IX. Thus, Grove City is neither an applicant for nor a recipient of federal financial assistance.[16] Further-

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[15] *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L. J. 49, 63 (1976) and the federal education grant statutes described therein.

[16] Because Grove City is neither an applicant for or recipient of federal financial assistance, HEW's Assurance requirement does not apply. *See* 45 C.F.R. § 864. Indeed HEW's regulations expressly contemplate that the application for federal financial assistance include an assurance from the applicant or recipient. *Id.* Since Grove City has not applied for

more, because Congress precisely defined educational institution in Section 901(c), this "strongly indicates that it did not equate education program with educational institution." *Rice v. President and Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981). Here, no nexus has been established between the purpose of Title IX to protect intended beneficiaries from sexual discrimination by recipients administering federal grant programs and the programmatic scope of Title IX to support HEW's enforcement of its regulations.[17] Accordingly, Title IX's prohibitions are inapplicable in this case.

C. Termination of All Student Loans and Grants Is Inconsistent with Title IX's Pinpoint Termination Provision.

By adopting the identical administrative scheme for terminating federal financial assistance under Title IX as under Title VI, Congress made a conscious decision to limit enforcement of Section 901 to the particular education "program or activity [of]

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federal assistance, it can not be deemed a recipient and, accordingly, Title IX does not apply.

[17] The Sixth Circuit in *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979), has cogently observed:

> The concern of this particular statute is not with all discrimination against persons in any way connected with educational institutions which receive federal funds. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance . . . ." Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by § 1681.

any recipient" with termination of federal funds "limited to the particular political entity, or part thereof," if in fact there was discrimination to intended beneficiaries of such programs or activities. 20 U.S.C. § 1682. Thus, federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". As a corollary, a remedy for the aggrieved is not available unless the complainant participated in a program which received federal assistance and was the intended beneficiary of that assistance.

Termination of student loans and grants in this case because of Grove City's failure to complete the Assurance Form turns the statute around. Under the Third Circuit's decision, the acceptance by an educational institution of a student who has received unearmarked federal assistance outside its auspices subjects the entire institution and all of its programs to Title IX's prohibitions. This interpretation is erroneous. Thus, inconsistent with the plain meaning of the words used in Section 902 and its legislative history, HEW's regulations broadly cut across all programs of an institution irrespective of whether there was a federal program or whether the particular program was supported by federal funds.

Again, the flaw in the Third Circuit's interpretation of the meaning of the language in Section 902—Title IX's enforcement provision—is supported by the legislative history of the identical provision found in Title VI.[18] During the Congressional hearings on the 1964 Civil Rights Act, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in

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[18] *See* Kuhn at 65-67.

another. The Administration's cabinet-level representatives' consistent answer was that it could *not*.[19] A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program.

During House debate on H.R. 7152, the enforcement authority of Title VI was not completely understood. To clarify the situation, Congressman Mathias brought to his colleagues' attention Attorney General Kennedy's assurance during committee hearings that any termination of assistance would be "as specific and particular as it possibly could be" and he highlighted that this certainty was the understanding of the members of the Committee in working on the bill.[20]

When the House bill, H.R. 7152 reached the Senate, the Senate floor leader for Title VI emphasized that "[p]articipation in one program would not justify the exaction of a nondiscrimination assurance concerning some other program." [21] Similarly, Sena-

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[19] *See Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. (1963) at 1543 (colloquy between Representative Meader and HEW Secretary Celebrezze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, as amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. (1963) at 2685, 2766. Attorney General Kennedy indicated that the termination of assistance be limited to the particular program and location where the discrimination exists.

[20] 110 Cong. Rec. 2486 (1964) (remarks of Rep. Mathias).

[21] *Id.* at 7059 (remarks of Sen. Pastore).

tor Ribicoff pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[22] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the pinpoint termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, in the form of the Dirksen-Mansfield substitute, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced."[23] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs and such termination "will be restricted to the particular subdivision" in which discrimination is found.[24] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the

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[22] *Id.* at 7067 (remarks of Sen Ribicoff).

[23] *Id.* at 12689 (remarks of Sen. Saltonstall).

[24] *Id.* at 12714-15 (remarks of Sen. Humphrey). See also *id.* at 13377 (remarks of Sen. Ribicoff).

Senate amendments to the bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law." [25]

This view of legislative history of Title VI has been affirmed by the courts. In *Bd. of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit held that programs could not be condemned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *Accord, Gatreaux v. Romney*, 457 F.2d 124, 128 (7th Cir. 1972) (federal assistance to model cities program unrelated to housing cannot be terminated because of discrimination in a low-rent housing program).

The legislative history of Title VI makes clear, therefore, what is evident from the statutory language—federal assistance in one program cannot be terminated because of a finding of discrimination in another program. There is, moreover, no remedy available unless the complainant was the intended beneficiary of that assistance. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674-676 & n.4 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980).[26]

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[25] *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) at 6.

[26] *See also Simpson v. Reynolds Metal Co.*, 629 F.2d 1226, 1233 n.12 (1980); and *Trageser v. Libbie Rehabilitation Cen-*

These Title VI standards apply to Title IX. Although Senator Bayh's first proposal adopted an institutional rather than pinpoint termination procedure,[27] his second proposal adopted the House bill's Section 902 language. In doing so, Senator Bayh incorporated the pinpoint termination procedure found in Section 602 of Title VI. Moreover, as noted by this Court in *North Haven*, HEW "recognized that § 902 limited its authority to terminate funds to particular programs that were found to have violated Title IX" and that HEW expressly adopted the Fifth Circuit's decision in *Finch*. 102 S. Ct. at 1927.

Accordingly, in adopting Section 902 as the mirror image of Section 602, Congress made a conscious decision to limit enforcement of Section 901 to the particular educational "program or activity" receiving federal funds. This means, for example, that Title I funds can only be terminated if there is discrimination in a Title I program, and only to that part of the educational institution in which the discrimination occurred. Moreover, federal assistance to a Title I program cannot be terminated because of discrimination in a program funded under the Vocational Educational Act, 20 U.S.C. §§ 1241-1391.

Termination of all student grants and loans because Grove City did not complete the Assurance Form is inconsistent with Title IX's program specific scope and pinpoint termination provisions. Thus,

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ter, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979). *But see LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982), No. 82-862, *pet. for cert. granted.*

[27] *See* 117 Cong. Rec. 30408 (1971) (colloquy between Senators Dominick and Bayh).

under HEW's application of Title IX and the Third Circuit's interpretation, only if an educational institution is completely self-supporting—receives no direct or indirect federal assistance—would it be exempt from the Assurance Form requirement. Derivatively, every program and the entire institution is covered by Title IX if only one student receives federal support. Such a result is absurd, especially as here, where the educational institution has consciously attempted to avoid federal entanglements through direct financial assistance for any of its programs. Because, as discussed above, an entire institution is not subject to Title IX's strictures if one program receives federal aid, then it is beyond debate that the receipt of unearmarked federal loans or grants by 1, 5, 10, 50 or 200 students which the college has no role in administering does not bring the entire institution under Title IX.[28] To do so completely rewrites the statute.

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[28] In similar fashion, HEW's investigation of employment discrimination complaints under Title IX has been inconsistent with the program specific and pinpoint termination provisions of Title IX. Thus, HEW has not attempted to determine whether there has been discrimination against intended beneficiaries of federal funds or indeed whether the complainant is an intended beneficiary. Moreover, HEW's institutional view of federal assistance has caused it to conduct investigations of employment practices beyond the parameters of the particular program receiving federal assistance. Accordingly, when HEW has found noncompliance in employment practices, it has sought to terminate all federal funds in all programs irrespective of any finding of discrimination of intended beneficiaries and irrespective of that part of the educational institution in which the discrimination occurred. *See, e.g., Dougherty City School System v. Bell*, 30 FEP Cases 1307 (5th Cir. 1982).

The policies underlying Title IX call for a more limited application of HEW's regulatory and enforcement authority. Before it requires completion of an Assurance Form, the program specific scope of Title IX requires that HEW ascertain which program(s) administered by the recipient directly benefited from the federal assistance and to limit the applicability of the Assurance Form to these programs. Because Title IX is designed to protect intended beneficiaries from sex discrimination, the purposes of the statute are not furthered by termination of funds in programs in which there is no evidence of discrimination. *See Dougherty City School System v. Bell*, 30 FEP Cases at 1308 ("Insofar as the department's order defers funding of programs that do not discriminate on the basis of sex, the department's action is ultra vires."). In any event, to the extent that the recipient is found to have discriminated against an intended beneficiary but does not take corrective action, termination of funding is limited to the program in which HEW finds noncompliance. To use procedures other than these violates the program specific scope and pinpoint termination procedures of Title IX.

D. The Third Circuit's Decision Is Contrary to the Decisions of This Court.

Although Title IX prohibits sex discrimination in any "education program and activity receiving Federal financial assistance," 20 U.S.C. § 1681(a), the court below construed its scope as regulating all practices of the College in circumstances in which Grove City did not directly receive federal assistance; that is, no program was identified which benefited from that assistance. This Court stated, however, in find-

ing a private right of action under Title IX in *Cannon*:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX *with an unmistakable focus on the benefited class*, had written it simply to a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. (Emphasis added, footnote omitted.)

441 U.S. at 690-693. In doing so, this Court implicitly recognized the program specific nature of the benefited class under Title IX, as well as the inapplicability of Title IX to an educational institution unless the institution as a recipient of federal aid administered a federally funded program to benefit students. Indeed, in *Cannon* the Court specifically found that the "petitioner [student applicant] is clearly a member of that class for whose *special* benefit the statute was enacted." *Id.* at 694 (emphasis added).

In *North Haven*, after reviewing Title IX's language and its legislative history, the Court addressed whether HEW's employment regulations were too broad. While it stated that the "employment regulations do speak in general terms of an educational institution's employment practices," the Court carefully pointed out that "they were limited by the provision that states their general purpose: 'to effectuate Title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity* receiving Federal financial assistance . . . .'" 102 S. Ct. at

1926-1927. The Court also noted that HEW in publishing its employment regulations "recognized that § 902 limited its authority to terminate funds to *particular programs* that were found to have violated Title IX." *Id.* at 1927. Thus, rather than adopting an institutional approach to Title IX enforcement, this Court expressly recognized that HEW's regulations must be applied consistent with the program specific limitations Congress enacted in Sections 901 and 902. *Id.*

Moreover, in remanding *North Haven* for further proceedings, the Court identified three factual circumstances which could limit HEW's jurisdiction to investigate employment practices: (1) that the complaining employees' salaries were not funded by federal money; (2) that the employees did not work in an education program that received federal assistance; or (3) that the discrimination they allegedly suffered did not affect a federally funded program. Through these examples the Court reaffirmed the essential ingredients of HEW's authority under Title IX. That is, in order for HEW properly to exercise its jurisdiction, it must show that the recipient educational institution administers a federally funded program in which the benefited class participates or that there has been discriminatory conduct that affects the benefited class. In this case, HEW has established neither and, accordingly, application of the Assurance Form requirement and termination of student grants and loans is in excess of HEW's regulatory and enforcement authority.

CONCLUSION

The decision of the court of appeals should be reversed and the Court's opinion should make clear that Title IX is program specific and is inapplicable to the Petitioners in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, *et al.*,
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v.

T. H. BELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF HILLSDALE COLLEGE IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF HILLSDALE COLLEGE IN SUPPORT OF PETITIONERS

INTEREST OF HILLSDALE COLLEGE

This case concerns the lawful interpretation of Title IX of the Education Amendments of 1972,[1] and the proper extent of the Department of Education's regulatory authority[2] under this statute. At issue before the Court

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[1] 20 U.S.C. §§ 1681-1686 (1976) ("Title IX").

[2] When this lawsuit was initiated, these regulations were administered by HEW and were codified at 45 C.F.R. Part 86. They were recodified at 34 C.F.R. Part 106 in substantially identical form on

is the propriety of the Department's attempted exercise of regulatory control over the operations of Grove City College, a private, co-educational, liberal arts college located in western Pennsylvania. From its inception, Grove City College has consciously and consistently refused any form of Federal financial assistance, so as to preserve its institutional autonomy and freedom from governmental intervention into its private academic affairs.

The factual posture of the *Hillsdale College v. Department of Education*[3] case is strikingly similar. In that case, identical issues with respect to the proper scope of the Title IX legislation, and its implementing regulations, have been raised. Hillsdale College is a private, non-sectarian, co-educational college located in Hillsdale, Michigan. Since its founding in 1844, Hillsdale has also refused to accept any federal or state financial assistance because of its real fear that to do so would inevitably subject it to governmental prescription of education policies, thereby jeopardizing the College's academic independence.

The sole basis for the efforts made by the Department to regulate the academic affairs of Hillsdale and Grove City Colleges is the fact that both Colleges accept for enrollment students who participate in certain federal programs and who receive federal financial assistance in

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May 9, 1980, in connection with the establishment of the Department of Education ("the Department"). 45 Fed. Reg. 30802, 30962-63 (1980).

[3] *Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. filed sub nom. Hillsdale College v. Department of Education*, 51 U.S.L.W. 3704 (U.S. March 16, 1983) (No. 82-1538) ("*Hillsdale College*"). No decision has been announced on Hillsdale's application. The Court may have followed the Solicitor General's suggestion that it be held in abeyance pending resolution of *Grove City College v. Bell*.

the form of federal grants or loans.[4] The Department has argued that the participation in student assistance programs by certain students attending these Colleges suffices to allow the categorization of the entire educational institution which they attend as a "recipient" of "federal financial assistance," as contemplated by Title IX. It should be stressed that no allegations or findings of discrimination have been made against either College; rather, at issue is the initial coverage and jurisdiction of the statute absent a finding of sexual (or other) discrimination.

As a result of this interpretation of Title IX in both the *Hillsdale College*[5] and *Grove City College v. Bell*[6] cases, the Department has claimed regulatory authority over the Colleges and has sought the submission by the Colleges of an executed Assurance of Compliance with the Title IX regulations.[7] This document requires a signatory to confirm that each education program or activity operated by the applicant/institution to which the regulations apply will be conducted in compliance with Title

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[4] The particular grant program at issue in the *Grove City College* case is the Basic Educational Opportunity Grant Program ("BEOG") (20 U.S.C. § 1070a (1976 & Supp. V 1981)). Grants under this program are now called "Pell Grants." For the sake of consistency, we will continue to refer to this program as the BEOG Program. At Hillsdale, students also participate in the National Direct Student Loan Program ("NDSL") (20 U.S.C. §§ 1087aa *et seq.* (1976 & Supp. V 1981)) and the Supplemental Educational Opportunity Grant Program ("SEOG") (20 U.S.C. § 1070b (1976 & Supp. V 1981)). As discussed *infra* at 11-15, Hillsdale believes that the legal analysis of the Colleges' involvement in the student assistance programs, and whether they constitute a "program or activity" under Title IX, remains the same in both factual contexts.

[5] *Hillsdale College, supra* n.3, at 2.

[6] 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3598 (U.S. Feb. 22, 1983) (No. 82-792) ("*Grove City College*").

[7] The document the Colleges were asked to submit was HEW Form 639A.

IX and the regulations.[8] Both Hillsdale and Grove City Colleges have resolutely refused to execute such an Assurance because they challenge both the applicability of the statute to *any* of their operations, and because they question the entire theory of regulatory coverage advanced by the Department.

Hillsdale and Grove City Colleges have interposed administrative and judicial challenges to the Department's attempted exercise of regulatory authority over their academic operations. In the *Hillsdale College* case, the Court of Appeals for the Sixth Circuit recently entered its decision wherein it "agree[d] with Hillsdale in part and HEW in part."[9] The Sixth Circuit also agreed *in part* with the earlier ruling made by the Court of Appeals for the Third Circuit in the analogous case of *Grove City College*.

In its decision, the Sixth Circuit found Hillsdale to be a "recipient" of "federal financial assistance" under Title IX, and therefore subject to regulation under the statute.[10] This aspect of the decision is consonant with the ruling by the Third Circuit Court of Appeals in the *Grove City College* case.[11] Thus, a fundamental premise of Hillsdale and Grove City Colleges' position has been

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[8] The basis for the Department's requirement is found in 34 C.F.R. § 106.4 (1982), which provides:

> (a) General. Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

[9] *Hillsdale College*, 696 F.2d at 430.

[10] *Id.*

[11] *Grove City College*, 687 F.2d at 693.

rejected by the Circuits and, as a result of these rulings, the Colleges have been made subject to coverage and regulation under Title IX.[12] Moreover, unless these private educational institutions capitulate in their pursuit of basic academic principles and independence, the federal educational assistance monies (in the form of loans and grants) received by their students have been made subject to termination.

However, in its decision in *Hillsdale College* the Sixth Circuit agreed with the College's position with regard to the "program-specificity" issue. It found that the Department's policy of enforcement and regulation was invalid—to the extent that it sought to subject Hillsdale's operations to institutionwide control. The court concluded that the regulations "as applied . . . , contravene the program-specific nature of Title IX by equating the statutory phrase 'education program and activity' with the educational institution itself."[13] Thus, the Sixth Circuit in the *Hillsdale College* case rejected both the Department's *and* the Third Circuit's position concerning the proper ambit of regulatory authority under the statute. In *Grove City College*, by contrast, the Third Circuit held that the entire operation of the College can properly be considered the relevant "program" under Title IX.[14]

Thus, as noted, the factual postures of the *Hillsdale College* and *Grove City College* cases are, in many respects, identical. This factual similarity points out the

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[12] Hillsdale is particularly disheartened by the Sixth Circuit's ruling on the "recipient" issue, in that the rationale behind the court's ruling on this important matter is not readily decipherable from the court's opinion. Thus, the College has been made subject to Title IX and its regulations without being informed of the basis therefor.

[13] *Hillsdale College*, 696 F.2d at 424.

[14] *Grove City College*, 687 F.2d at 700.

fact that the issues in the *Grove City College* case impact upon Hillsdale College as well as a number of other private educational institutions. In addition, Hillsdale respectfully submits that its direct involvement in issues which are before the Court in this case warrants particular consideration of its brief by the Court.

Grove City College recently petitioned this Court for a writ of certiorari relying, in part, upon the conflict produced by the Sixth Circuit's decision in the *Hillsdale College* case.[15] On February 22, 1983, a writ of certiorari was granted by the Court in the *Grove City College* case. After the decision by the Sixth Circuit in the *Hillsdale College* case, Hillsdale College also sought review of its case by the Court and, to this end, filed a petition for writ of certiorari on March 16, 1983. In its petition, the College noted, *inter alia*, the presence of a conflict between the Circuits, and suggested that consolidation of the *Hillsdale College* and *Grove City College* cases for review and consideration by this Court would be appropriate.

It is apparent that the Court has deferred making a decision on Hillsdale's petition pending consideration of the *Grove City College* case. However, Hillsdale's interests remain critically and inextricably involved in the instant proceeding before the Court. The proper interpretation of Title IX and its implementing regulations necessarily involves significant issues which directly concern Hillsdale College, and which will affect many of its future actions. For this reason, the College hopes that this brief will provide assistance to the Court in its consideration of this important matter.

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[15] *See* Grove City College Petition for Writ of Certiorari, filed Nov. 9, 1982, at 13-14. *See also* Grove City College Reply Brief (to Brief for the United States in Opposition to Grove City College Petition for Writ of Certiorari), filed Feb. 4, 1983, at 1, 9, 10.

Moreover, Hillsdale, an institution representative of the many private educational institutions which have sought to avoid intrusive federal intervention into their private academic affairs, can contribute significantly to these proceedings. Hillsdale believes that these private institutions provide important diversity and balance to the American educational experience. This very important public-interest factor should be given due consideration by the Court.

SUMMARY OF ARGUMENT

This case presents important issues which require clarification by this Court. Title IX of the Education Amendments of 1972 is limited in its application to those particular programs and activities within an educational institution which receive federal assistance under specific federal grant statutes. The Department of Education's theory of coverage, and the ruling of the court below, contravene this statutory limitation and should, therefore, be interdicted by this Court.

Private educational institutions which decline federal assistance and which do not discriminate should be allowed to exercise academic freedom and independence from governmental interference in their affairs. In order to allow such educational institutions full academic autonomy, the Court should provide clarification and guidance as to the proper interpretation of the Title IX legislation. This judicial clarification is particularly necessary because of the changing administrative interpretations and arguments made by the Department of Education and its predecessor at different times and in different places on the same issues.

In its brief *amicus curiae*, Hillsdale College does not address all of the issues of importance raised by this proceeding; rather, the College endeavors to assist the Court by discussing certain of the broader issues presented by this case.

ARGUMENT

I. Title IX Is Expressly Limited to Those Particular Activities and Programs Within an Educational Institution Which Receive Federal Financial Assistance Under Specific Federal Grant Statutes; Regulations Extending Beyond the Statute Which Attempt to Reach Educational Institutions That "Benefit" from Such Grants Are Excessive and Invalid.

Under Title IX of the Education Amendments of 1972, the beneficiaries of federally assisted education programs and activities are protected from discrimination on the basis of sex by the institution which operates such programs and activities. Specifically, 20 U.S.C. § 1681 (1976) provides that no person shall, on the basis of sex:

> —be excluded from participation in any education program or activity receiving federal financial assistance;
>
> —be denied the benefits of any education program or activity receiving federal financial assistance; or
>
> —be subjected to discrimination under any education program or activity receiving federal financial assistance.[16]

Under the statute, therefore, before an educational institution can be deemed a "recipient" of federal financial assistance and thereby subject to Title IX, the institution must operate an "education program or activity" which *receives* federal financial assistance, *i.e.*, a program or activity authorized by and funded under federal assistance statutes.[17]

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[16] 20 U.S.C. § 1681(a) (1976).

[17] By way of illustration, the proper application of Title IX would occur, for example, when a college operates a program to train bilingual teachers funded under the Bilingual Education Act. 20 U.S.C. §§ 3221 *et seq.* (Supp. V 1981). The college operating such a program would be the "recipient" of the federal aid, and the students eligible to enroll in that program would be the beneficiaries of

The Department concedes that neither Hillsdale nor Grove City College operates any such activities or programs, but nevertheless has insisted that it may subject these Colleges to Title IX and its implementing regulations.[18] This assertion of authority has occurred despite the fact that none of the programs or activities operated by these Colleges *receive* federal financial assistance. The Department's claim of authority is contained in the regulations it has promulgated to effectuate the prohibitions contained in Title IX. These regulations erroneously define the coverage of the statute and its regulations, and the crucial words "recipient" and "federal financial assistance." A cursory review of the pertinent regulations clearly illustrates the problem. 34 C.F.R. § 106.11, which sets forth the coverage of the regulations, provides:

> Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance.[19]

Moreover, 34 C.F.R. § 106.31(a), which sets forth the regulatory prohibition upon sexual discrimination in "education programs and activities," states that:

> Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient

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such aid. In such an instance, Title IX would prohibit the recipient institution from taking any action which would, because of the student's sex, exclude such student from participation in, or deny such student the benefits of, or subject him or her to discrimination under, this federally funded program.

[18] 34 C.F.R. Part 106 (1982).

[19] 34 C.F.R. § 106.11 (1982) (emphasis added).

> which receives *or benefits* from Federal financial assistance. (Emphasis added.)

Under the definitional section of the regulations, "Recipient" is defined to include:

> [A]ny public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives *or benefits* from such assistance, including any subunit, successor, assignee, or transferee thereof.[20]

In addition, "Federal financial assistance" is defined in the following manner to include:

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.[21]

Thus, although the coverage of Title IX is, by its very precise terms, limited to "education program[s] or activit[ies] *receiving* Federal financial assistance, . . ."[22] the Department's theory of regulatory coverage, and its regulatory definition of "recipient," is wholly at odds with this particular statutory limitation. Instead of "receipt" of federal assistance being the sole basis for inclusion under the statute, as distinctly provided by Title IX, the Department asserts that receives *or benefits* are the operative words for coverage—even though the words "receipt" and "benefit" are not equivalent in meaning. Due to the erroneous equation advanced by the Department and the implementing regulations' definition of "federal financial assistance" (incorporating this con-

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[20] *Id.* at § 106.2(h) (emphasis added).

[21] *Id.* at § 106.2(g)(1)(ii).

[22] 20 U.S.C. § 1681(a) (emphasis added).

cept) quoted above, the Third Circuit in the *Grove City College* case found the College's educational programs and activities to be subject to regulation, solely because the College accepts for enrollment students who receive federal financial assistance—which assistance *may* in turn be used to pay for certain educational services provided by the College.[23]

Because colleges are said to "benefit" from such student assistance, Grove City and Hillsdale Colleges are deemed to be "recipients" of Federal financial assistance—and are said to be subject to Title IX and its regulations. Hillsdale submits that it is self-evident that all of these regulations, as applied to Grove City and Hillsdale Colleges, are in excess of the statutory authority conferred upon the Department by Congress. The "federal financial assistance" which triggers the requirements of Title IX must be to an *educational activity or program*. Hillsdale and Grove City Colleges enroll students who "receive federal financial aid," but these Colleges do not operate any "education program or activity" which itself receives such assistance. The financial aid at issue here is not financial assistance to "an education program or activity," but *assistance to the students* to enable them to attend the colleges they wish.

At this juncture, an analysis should be made of the particular student assistance programs at issue in the *Grove City College* and *Hillsdale College* cases. In the *Grove City College* case, the effect of student participation in the Basic Educational Opportunity Grant Program[24] is under consideration. Under the BEOG program, federal assistance is provided directly to the students. By statute and federal regulation, the College's only function is ministerial—as it certifies students' enrollment and educational costs. Certain of Hillsdale's

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[23] *See* discussion *infra* at 14-15.

[24] 20 U.S.C. § 1070a.

students participate in this assistance program. Moreover, at Hillsdale College certain students also participate in other federal assistance programs—namely, the National Direct Student Loan Program [25] and the Supplemental Educational Opportunity Grant Program.[26] In these student assistance programs, the College voluntarily functions in an administrative capacity.[27] Under the NDSL and SEOG programs, the College disburses educational funds provided by the federal government to those students who apply for such assistance. It must be stressed that this disbursement is made *solely* on the basis of predetermined eligibility criteria prescribed by regulations which consider financial requirements and the expected family contribution to educational costs. The determination of eligibility is based upon financial statements filed by student applicants interested in securing such assistance. This statement is examined by a private firm which, in accordance with regulatory requirements, runs a "needs analysis" evaluation and determines the appropriate family contribution to a student's educational costs. As noted, a college whose students participate in these programs then disburses available assistance monies based solely upon this independently determined needs analysis. The various student assistance programs funded under Title IV of the Higher Education Act of 1965, as amended,[28] are carefully prescribed. Specifically, an educational institution whose students receive monies under these programs

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[25] *Id.* at §§ 1087aa *et seq.*

[26] *Id.* at § 1070b.

[27] The College may apply for reimbursement of the administrative expenses incurred in running these programs; however, it foregoes such monies in order to maintain its educational independence.

[28] *See* 20 U.S.C. §§ 1070 *et seq.* (1976 & Supp. V 1981). Title IV student assistance programs include, *inter alia*, the BEOG, NDSL, SEOG and Guaranteed Student Loan (20 U.S.C. §§ 1071 *et seq.* ("GSL")) Programs.

must certify that the educational funds will be used solely for purposes specified in the regulations, and that the assistance programs will be administered in accordance with the pertinent statutory and regulatory provisions.[29]

Hillsdale asserts that it is clear that under *all* of the programs at issue in the *Grove City College* and *Hillsdale College* cases, the only "recipient" of federal assistance is the *student*—who then uses the monies provided for a variety of educational purposes. Under these programs, the educational institutions are not given any monies to use for their own purposes. Instead, under certain programs (*e.g.*, BEOG, GSL), assistance monies go directly to the students, whereas in other programs (*e.g.*, NDSL, SEOG), assistance monies are sent to the educational institution for disbursement to eligible students based upon an independently determined analysis of financial need. In the latter situation, the college serves only in a traditional fiduciary capacity. The college has no ability to use the funds transmitted by the federal government for its own purposes and, instead, has been given a carefully defined administrative responsibility to disburse funds based upon financial need to those particular students who apply for such assistance.

Under all of these programs, the student who applies for and is awarded federal financial assistance is the "recipient." There is *no* educational activity or program at these Colleges which receive federal assistance, and therefore there is no basis for statutory or regulatory coverage under Title IX.*

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[29] *See* 34 C.F.R. §§ 674.8 (NDSL), 676.8 (SEOG) (1982).

* On June 6, 1983, as it was going to press with this brief, Hillsdale College received a copy of the brief *amici curiae* in support of Petitioners, filed in this proceeding by Mountain States Legal Foundation and the American Association of Presidents of Independent Colleges and Universities. In their brief, these groups assert that certain student assistance programs at Hillsdale subject the College

In addition, it must be stressed that Hillsdale and Grove City Colleges accept for enrollment students who receive federal grants and loans. Student beneficiaries of federal educational assistance in turn spend these monies in exchange for a variety of educational services—*only some* of which may be provided by the colleges. The fact of this potential payment to the colleges of some funds derived from a federal grant does not suffice to transform the educational institutions into "recipients" of "federal financial assistance." Instead, the use of federal assistance monies at private educational institutions are payments for services rendered, and do not constitute assistance to the educational institutions.[30] Moreover, the logical extension of this "benefits" theory would extend federal statutory and regulatory authority over numerous other private vendors whose services a student might pay for with assistance monies received from the federal government. Hillsdale submits that this is an absurd result which was never countenanced by Congress.[31] The assistance provided to students under

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to Title IX and its regulations because the College has "administrative and discretionary authority to select beneficiaries . . ." (*see Amici Curiae* Brief at 8), whereas at Grove City College there is no such basis for regulatory authority because the students *directly* receive educational assistance monies. For the reasons discussed in its brief, Hillsdale respectfully submits that no meaningful factual or legal distinction can be drawn based upon the type of student assistance program involved. Hillsdale receives no federal assistance under the "campus-based" educational assistance programs in which its students participate. The fiduciary duty imposed upon the College concerning disbursement of assistance monies, and the requirements imposed by statute and regulations, confirm this conclusion.

[30] *See University of Richmond v. Bell*, 543 F. Supp. 321, 330 (E.D. Va. 1982).

[31] For example, assistance monies may properly be used to pay for a student's room and board expenses. Under the Department's interpretation of the statute, payments made for these services would constitute an adequate basis to characterize vendors providing same as "recipients" of federal financial assistance under Title IX, and

these federal loan and grant programs is not federal assistance to the educational institution such students attend, and does not constitute a valid basis for the assertion of federal regulatory authority under Title IX.

The clear and unambiguous significance of the terms of the statute, which limit coverage to educational activities or programs which receive federal financial assistance, should not be tortured beyond recognition to produce the result advanced by the Department and by the Third Circuit in the *Grove City College* case. It is well established that the starting point for statutory interpretation is the language of the statute itself.[32] Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.[33] Moreover, in cases involving statutory construction, words are normally interpreted as taking their ordinary, contemporary and common meanings.[34] Under these fundamental precepts of statutory construction, it is clear that the statute's limitation upon coverage—to those who *receive* federal financial assistance—should be honored by the courts and by the agency entrusted with the enforcement of this legislation.

In addition, the accuracy of this conclusion—that neither Hillsdale nor Grove City Colleges are "recipients" of "federal financial assistance" under Title IX—is confirmed by a brief analysis of the pertinent legislative

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would require their execution and filing of the requisite Assurance of Compliance.

[32] *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). ("It is elementary that '[t]he starting point in every case involving construction of a statute is the language itself'." (citations omitted.))

[33] *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[34] *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975).

history of this legislation, and by reference to the legislative history of Title VI.[35]

A review of the limited legislative history surrounding the enactment of Title IX simply cannot support an interpretation of the statute, which would extend the statutory language "receiving federal financial assistance" beyond its naturally understood meaning, to the Department's regulatory concept of coverage which maintains that receipt of *or benefit from* federal assistance triggers the applicability of Title IX and its regulations. Thus, the Department and the Third Circuit in the *Grove City College* case have acted in a manner contrary to both the clear and evident meaning of the statute and its legislative history.

Specifically, when Title IX was pending in Congress the question of the proper treatment of student assistance was raised. Senator Bayh, the sponsor of the Senate version of Title IX, was asked what kind of aid the Department could terminate for violation of the then-to-be promulgated sex discrimination regulations. Bayh confirmed that Congress did not intend a denial of aid to students as a sanction under Title IX. This conclusion is found in a discussion had between Senators Bayh and Dominick, wherein Senator Bayh stated:

> It is unquestionable, in my judgment, that this [termination power] would not be directed at specific assistance that was being received by individual students, but would be directed at the institution . . . .[36]

Hillsdale believes that Senator Bayh's response to the question posed concerning student assistance indicates

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[35] Consideration of the legislative history of Title VI is appropriate, as Title IX was in part based upon the earlier legislation enacted as Title VI of the Civil Rights Act of 1964 (which prohibits race discrimination in federally assisted programs). *See Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979).

[36] 117 Cong. Rec. 30408 (1971).

that he did not consider such assistance to be federal financial assistance *received* by an educational institution but, rather, viewed it as educational assistance provided to individual students.[37]

It is unquestionable that aid to a student is *not* aid to an activity or program, and that receipt of federal financial assistance is one thing whereas benefitting from its existence is quite another. The Department's obliteration of these critical distinctions renders meaningless Congress' careful use of the words "program or activity receiving Federal financial assistance" to define the scope of Title IX's coverage, and resurrects the very institution-wide coverage which Congress rejected.[38]

The legislative history and interpretation by the Executive Branch of the terms "program or activity" (which appear in Title VI) also confirm that there is indeed a critical distinction between aid "to a person" and aid "to a program or activity." By letter written to Representative Emmanuel Celler (Chairman of the House Judiciary Committee when Title VI was pending), the Justice Department described certain programs which would *not* be considered to be covered by statute. This list included:

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[37] *See also* a later colloquy between Senator Bayh and Rep. Quie during hearings held by the House reviewing the Department's Title IX regulations:

> Rep. Quie: . . . I have heard it claimed that that [the view that the educational institution is a "recipient" if a student is receiving Federal assistance] is one of the reasons why they [the Department] have jurisdiction.
>
> Senator Bayh: I have not.

Hearings Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 182 (1975).

[38] *See* original Senate (amendments to S. 659, 92d Cong., 1st Sess., 117 Cong. Rec. 30156 (1971)) and administration (H.R. 5191, 92d Cong., 1st Sess. § 1001(b) (1971)) versions of the Title IX legislation.

> [a] number of programs administered by Federal agencies [which] involve direct payment to individuals possessing a certain status . . . . [T]o the extent that there is financial assistance . . . the assistance is *to an individual and not to a 'program or activity'* as required by Title VI.[39]

Hillsdale submits that the strained interpretation of Title IX advanced by the Department and by the Third Circuit in *Grove City College* is contrary to both the clear terms of the statute itself and the pertinent legislative history surrounding its enactment.

II. Private Education Provides Important Diversity to American Education.

The *Grove City College* and *Hillsdale College* cases raise issues of critical importance to a sizeable segment of the academic community. At issue is the ability of private colleges to operate independently from governmental control and intervention, which the Department asserts as a condition of its continuation of educational assistance to the Colleges' students. Specifically, at issue is the legality of efforts to designate Grove City College a "recipient" of Federal financial assistance, and the concomitant effort made by the Department and the Third Circuit to subject all of the activities and programs of Grove City College to federal control. Grove City and Hillsdale Colleges do not argue with the merits of the Title IX legislation; rather, they dispute the authority of the federal government to regulate the activities of private, independent colleges which refuse federal assistance, and which are not even alleged to be in violation of the anti-discrimination laws.[40]

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[39] *Hearings Before the Comm. on the Judiciary on H.R. 7152, As Amended by Subcomm.*, 88th Cong., 1st Sess. 2773 (1963) (emphasis added).

[40] Hillsdale College has historically followed a policy of nondiscrimination. The College admitted both blacks and women *before* the Civil War. Indeed, the first woman in Michigan to graduate

There is a broad and valid consensus that independent, private educational institutions provide important diversity and balance to what would otherwise be an exclusively state-run system, and that the preservation of that diversity is in the national interest. For example, Joseph Califano, a former Secretary of the Department, stated of private colleges and universities:

> They have been guardians of independent thinking and academic freedom, enjoying a bit more insulation from the whims and pressures of politics than their tax-supported sisters.
>
> Perhaps the greatest contribution of these private institutions, beyond training talent for the nation, has been diversity; the rich variety that colleges like this lend to the American educational landscape. What an incredibly rich resource: Hundreds of institutions, each independent; each solving its problems in its own way; each a vital center of innovation and experiment; each with its own special commitment to cultural and moral values.
>
> It is this diversity that gives American higher education and American life so much of their vitality. It is this diversity that your national government is pledged to nourish and safeguard.[41]

Similarly, this Court has also recognized the importance of academic freedom, and has struck down governmental attempts to prohibit private education and to interfere unnecessarily with the autonomy and independence of private educational institutions.[42]

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with a Bachelor of Arts Degree (she was the second woman in the United States to do so) received her degree from Hillsdale in 1852.

[41] 123 Cong. Rec. E3798 (daily ed. June 15, 1977). *See also* 117 Cong. Rec. 39249 (1971) (remarks by Rep. Erlenborn); H.R. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2590.

[42] *See Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Despite this consensus, governmental regulation of private university education has grown so pervasive and particular that there is a genuine concern that the diversity represented by such institutions will soon disappear as all universities are increasingly compelled to conform to a particular federal model or archetype.[43] The restriction of the Department's regulatory authority to that mandated by the Title IX legislation will promote diversity in private education, and will thereby foster the various important values such private education provides.

III. This Case Involves Critical Issues Concerning the Scope of Governmental Authority to Regulate Private Independent Colleges Which Require Resolution and Clarification by This Court.

Hillsdale submits that a detailed and careful consideration of all the issues raised by the *Grove City College* case is warranted—so that private institutions will be given clearer guidance as to the meaning of Title IX, and will have a greater ability to predict the consequences of their actions in their efforts to remain free from federal control. Specifically, in the *Grove City College* and *Hillsdale College* proceedings, the Department has changed its position concerning aspects of this legislation and its view of the proper interpretation thereof. For example, the Department no longer contends, as it did originally, that the Guaranteed Student

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[43] *See* the statements of Kingman Brewster, then President of Yale University, and of Dallin Oaks, then President of Brigham Young University, in Hearings on *Sex Discrimination Regulations Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. at 231-37 (Oaks) and at 234 (Brewster), and the statement of John R. Hubbard, President of the University of Southern California, quoted in Oaks, *A Private University Looks at Government Regulation*, 4 J. of Coll. and U. Law 4, 8 (1976). *See also* G. Roche, *The Balancing Act* (1974). The author, Dr. George C. Roche, III, is President of Hillsdale College.

Loan Program is covered by Title IX. Also, by way of illustration, the Department has changed its position concerning the "program-specificity" aspect of the Title IX legislation.[44] Indeed, the Court has also recognized a certain variance in the Department's position concerning the proper interpretation of the Title IX legislation. In *North Haven Board of Education v. Bell*,[45] this Court stated:

> In construing regulations, the Court normally defers to the agency's interpretation. . . . Here, however, that interpretation has fluctuated from case to case, and even as this case has progressed. . . . Accordingly, *there is no consistent administrative interpretation of the Title IX regulations for us to evaluate.*[46]

The previous shifts in administrative and agency policy concerning the scope of Title IX and its regulations illustrate the need for a definitive and lasting resolution of this controversy by the Court. An administrative solution to the issues presented simply will not suffice, as future administrations and changing political considerations may reverse or modify any administrative victory obtained by the College. By providing final judicial clarification as to the scope of Title IX, the Court will give private educational institutions greater certainty as to the implications of their acts, and will therefore allow such institutions to exercise their aca-

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[44] Contrary to its original position in these cases, wherein the Department maintained that the entire educational institution constituted the relevant "program" under Title IX, the Department now contends that the statute and its regulations must be applied in a "program-specific" manner. In view of the conclusive decision by this Court on the "program-specificity" issue, the Department may legitimately have chosen to change its position. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 534-38 (1982).

[45] 456 U.S. 512 (1982).

[46] *Id.* at 538-39 n.29 (citations omitted, emphasis added).

demic freedom to the full extent allowed by law. The public interest requires such clarification now.

CONCLUSION

Throughout the many years of the *Grove City College* and *Hillsdale College* administrative and judicial proceedings, the Colleges' actions have been motivated solely by their principled objections to excessive governmental intrusion into their private academic affairs. In neither case has there been any allegation or finding of discrimination, and the Colleges have sought only to exercise their academic freedom and autonomy without unnecessary and unlawful interference. The Department of Education, through its regulations, seeks to intrude into areas, programs and activities beyond statutory authorization. This Court should give all interested parties definitive judicial clarification that such intrusion is beyond the lawful authority of the Department and contrary to the intent of Congress.

For the reasons set forth above, Hillsdale College respectfully requests that the decision of the Third Circuit Court of Appeals in *Grove City College v. Bell* be reversed by this Court.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,
Petitioners,
v.
T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Legislative Materials:

H.R. Rep. No. 2157, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News 4731 ..... 12n
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391 17
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Civil Rights Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess. (1963) 17
Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education & Labor, 94th Cong., 1st Sess. (1975) 13n, 20, 28n-29n
110 Cong. Rec. (1964) 6n, 16-17
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118 Cong. Rec. (1972) 13n, 14, 16n
120 Cong. Rec. (1974) 28n
121 Cong. Rec. (1975) 28n
122 Cong. Rec. (1976) 21, 28n
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1963 U.S. Code Cong. & Ad. News 1527 ..... 6n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-792

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

v.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE [1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 20 years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers.

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[1] Letters from counsel for the parties consenting to the submission of this brief have been filed with the Clerk.

The Lawyers' Committee has had a longstanding interest in eliminating sex discrimination in education and has consistently sought vigorous enforcement of Title IX of the Education Amendments of 1972.[2] In 1975, the Committee established a Federal Education Project, which has worked to eliminate sex bias and stereotyping in the vocational education programs which are offered by most of the nation's school districts. Research and observation by the Project indicate that there has been progress, over the last decade, in opening up opportunities for female students to learn the skills which can lead to highly paid jobs traditionally viewed as "male only" and from which women were often barred. The antidiscrimination requirements of Title IX—which have been interpreted to apply to all of a recipient school system's vocational curricula, even though federal Vocational Education Act funds constitute less than 20% of total program expenditures at the secondary school level—have contributed significantly to this progress.

Thus, the narrow approach to Title IX coverage proposed by the petitioners could jeopardize the achievement of fully equal opportunity for women in education and employment. The ruling sought by petitioners also would have grave implications for the scope of the antidiscrimination requirement in Title VI of the 1964 Civil Rights Act.[3] This possibility equally prompts the Committee's interest in the present case, for Title VI has been a criti-

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[2] For example, the Committee filed an *amicus curiae* brief in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) supporting the right of the petitioner in that case to bring a private suit to enforce Title IX.

[3] This Court has recognized in several recent rulings that Title IX was patterned after Title VI, a broad prohibition of racial discrimination in federally assisted programs; similar language in the two statutes is construed in a similar fashion absent contrary indications in the law or legislative history. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982); *Cannon v. University of Chicago*, 441 U.S. at 694-98.

cal element of the civil rights gains made during the past two decades.

Over the course of its work in the field of education, the Lawyers' Committee has come to realize that discrimination on the basis of race or sex is a serious impediment to equal opportunity for students, faculty and other staff members, whether or not that discrimination manifests itself within a particular constituent part of an educational institution that is formally designated as the "recipient" of an "earmarked" federal grant or contract. Titles VI and IX were enacted, in part, to insure that federal financial assistance made available by the Congress for *educational* programs does not subsidize discriminatory activities. Petitioners' interpretation of the scope of Title IX, which would permit an educational institution to receive funds made available by the federal government and to use those funds for its basic operating expenses, without undertaking any concomitant obligation to eliminate discriminatory practices, would thus be contrary to the purposes of Title IX.

SUMMARY OF ARGUMENT

I

The Third Circuit correctly held that Grove City College is a recipient of "Federal financial assistance" within the meaning of Title IX. The language of the statute, its administrative construction, and both its legislative and post-enactment history support the ruling below. An educational institution is subject to Title IX because it is a recipient of "Federal financial assistance" when it participates in a program under which the students whom it certifies are enrolled at its facilities receive federal funds, in amounts based in part upon the institution's tuition and related charges, and the students are required to use those funds "solely for expenses related to attendance or continued attendance at such institution."

II

The court below also correctly upheld the Department of Education's regulation requiring that Grove City College, like other recipients of Federal financial assistance, execute a written Assurance of Compliance with applicable substantive Title IX regulations of the Department, as a precondition to the award of BEOG grants to Grove City students. Both the Assurance and the Title IX regulations explicitly refer to and incorporate the statutory requirement of "program specificity," and both must therefore be sustained on the basis of this Court's reasoning in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). Furthermore, because BEOG student grants are intended to, and do support the entire educational program offered by Grove City College, on the facts of this case the entire institution is subject to Title IX's prohibition against discriminatory treatment because of sex.

ARGUMENT

I

GROVE CITY COLLEGE IS A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE FOR PURPOSES OF TITLE IX BECAUSE ITS STUDENTS RECEIVE FEDERAL EDUCATIONAL GRANTS BASED UPON THEIR MATRICULATION AT THE SCHOOL

A. The Language of Title IX Does Not Limit its Coverage to Agencies or Institutions Receiving Direct Cash Payments from the Federal Government; and the Language and Structure of the BEOG Program Compel the Conclusion that Grants to Grove City College Students are a Form of "Federal Financial Assistance" to the Institution

Petitioners contend that Title IX is wholly inapplicable to Grove City College because the school does not "receiv[e] Federal financial assistance" within the meaning of § 901(a) of Title IX of the Education Amendments of

1972, 20 U.S.C. § 1681 *et seq.* ("Title IX").[4] According to petitioners, this conclusion follows from the fact that the College does not request direct cash payment from the federal government[5] of the student assistance funds that make it possible for the individual petitioners to attend the institution.[6] However, this construction is inconsistent with the plain language of the statute.[7]

The term "Federal financial assistance," which first appeared in Title VI of the 1964 Civil Rights Act,[8] is

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[4] Grove City College has not itself sought federal grant or contract funds. Many students at Grove City, however, do receive funds from the federal government under the Basic Educational Opportunity Grant ("BEOG") program, 20 U.S.C. § 1070a, which they must use to pay for tuition, room and board, and other expenses related to their attendance at the College. *See* 20 U.S.C. § 1091(a)(5).

[5] *See* Pet. Br. at 14-17. Apparently the College foregoes the additional funds to which it would be entitled under federal law based upon the receipt of BEOG grants by its students, *see* 20 U.S.C. § 1070e. (Pet. Br. at 26 n.24.)

[6] *See Grove City College v. Harris*, 500 F. Supp. 253, 257 (W.D. Pa. 1980) (Amended Findings of Fact made by district court in this case).

[7] "Our starting point in determining the scope of Title IX is, of course, the statutory language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982).

[8] Petitioners suggest that the language enacted as Title VI represents a narrowing of a broader, earlier legislative proposal; and that Congress intended thereby to exclude from Title VI coverage all recipients of what petitioners term "indirect" assistance. (Pet. Br. at 29-30.) This overlooks the fact that in § 602 of Title VI, Congress specifically excluded two forms of financial assistance: contracts of insurance or guaranty. The addition of specific exclusions from the generic term "Federal financial assistance" in the final version of the statute eliminates the basis for any inference that other kinds of "Federal financial assistance," whether "direct" or "indirect," would not trigger coverage. *See North Haven*, 456 U.S. at 521-22 ("the absence of a specific exclusion . . . among the list of exceptions tends to support the Court of Appeals' conclusion that Title IX's broad protection . . . does extend . . .").

deliberately broad and covers the multitude of different arrangements by which the federal government may provide aid or support to an institution or agency.[9] Nothing in the language of the statute supports petitioners' view that the particular institutional entity, through which the "education program or activity receiving Federal financial assistance" is administered, must itself be the applicant for assistance or must receive a Treasury Department draft of funds in order to trigger Title IX coverage.[10] It is sufficient that the "education program or

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[9] This is hardly surprising, in light of the Congressional purpose to insure "that public funds, to which all taxpayers of all races contribute, not be spent *in any fashion which encourages, subsidizes, or results in* racial discrimination." 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress of June 19, 1963, *reprinted in* 1963 U.S. Code Cong. & Ad. News 1527, 1534) (emphasis added).

[10] Petitioners' interpretation of the statute would by its logic exclude from Title IX coverage a local school district which participated only in federal programs administered through the States. Petitioners disavow this result (*see* Pet. Br. at 17 n.17) but they do not explain how their position is consistent with their argument that Grove City College is not subject to Title IX because the Treasury Department sends its BEOG checks to individual students rather than to the institution.

Petitioners' concession is clearly correct. It has never been doubted, for example, that Title VI and Title IX apply to local school districts which obtain federal funds from their state educational agencies under the government's largest program of aid to elementary and secondary education, Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.*, formerly Title I of the Elementary and Secondary Education Act of 1965. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974); *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1071 (5th Cir. 1969) (receipt of Title I [then known as Title II] funds under 20 U.S.C.A. §§ 241a-m (Supp. 1969)).

Petitioners' attempted distinction of state-administered programs rests upon their contention that BEOGs do not amount to "Federal financial assistance" to an institution of higher education if the grants are paid to its students under the Alternate Disbursement System (*see* Pet. Br. at 17 n.17). This argument in turn incorporates a basic misreading of the grant statute. *See* text at pp. 7-8 *infra*.

activity" administered by the institution receive the assistance in some fashion.[11]

The language and structure of the BEOG statute confirm our view that the Department of Education's award of grants to Grove City students, upon certification by the College of their enrollment, makes the school subject to the coverage of Title IX.

The purpose of the federal higher education assistance programs, including BEOGs, is "to assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education . . . ." 20 U.S.C. § 1070(a).[12] Since there must be both a student and an educational institution in order for postsecondary education to be "ma[de] available," and since grants are awarded to students based upon (a) certification of a student's matriculation at such an institution, 20 U.S.C. § 1070a(a)(1)(A); 34 C.F.R. § 690.94(a)(3) (1982) and (b) determination of financial need based upon the actual costs of attendance at the certifying institution,

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[11] This Court recently declared in *North Haven*, 456 U.S. at 521, that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."

[12] More specifically, BEOGs are designed to:

> (i) . . . meet in academic year 1985-1986, 70 per centum of a student's *cost of attendance* not in excess of $3,700; and (ii) in combination with reasonable parental or independent student contribution and supplemented by the programs authorized under subparts 2 and 3 of this part, will meet 75 per centum of a *student's cost of attendance, unless the institution determines that a greater amount of assistance would better serve the purposes of section* [1070].

20 U.S.C. § 1070a(a)(1)(B) (emphasis added). This specific elaboration of purpose for BEOGs was added to the Higher Education Act in 1980. Prior to that time, the statute contained only the general "purpose" language of § 1070(a) quoted in text, but the amount of BEOG awards was still determined with reference to an institution's tuition and other charges. Petitioners' claims concerning the scope of Title IX coverage are the same, as we understand them, under either the pre- or post-1980 versions of the law.

20 U.S.C. § 1070a(a)(2), it is obvious that Congress intended the BEOGs program to make "Federal financial assistance" available to institutions of higher education selected by eligible students.

Petitioners' assertions that the College does not receive "Federal financial assistance" because Grove City students need not use their BEOG funds for the school's costs but "may" use the funds "for virtually any purpose" (Pet. Br. at 5 n.9) simply blinks legality, as well as reality. The statute not only ties the amount of a grant to the actual costs at the particular institution which a student chooses to attend, but it also requires a statement (which must be filed "with the institution of higher education which the student intends to attend, or is attending" [13]) stating that the grant "will be used solely for expenses related to attendance or continued attendance at such institution." 20 U.S.C. § 1091(a)(5).[14] Thus, BEOG awards flow through the student to the higher educational institution.[15]

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[13] The statement filed with the school provides assurance to the institution that a student or admittee will be able to meet the costs of his or her attendance during the school year to which the BEOG is applicable.

[14] The current statutory language was added in 1980, but the requirement of filing a statement or affidavit to this effect was contained in the original BEOG legislation. *See* Pub. L. No. 92-318, § 139C, *reprinted in* 1972 U.S. Code Cong. & Ad. News 335.

In any event, on this record there is no issue. Individual petitioners admitted, and the district court found, that without their BEOG awards each would be unable to attend Grove City College. *See* 500 F. Supp. at 257.

[15] It is also patently wrong to assert, as do petitioners, that there is only an "attenuated nexus between [Education] Department-administered funds and the College" (Pet. Br. at 47) because under the BEOG program Alternate Disbursement System, the "only role which the College plays . . . is supplying requested information to the scholarship or loan-granting organization . . . ." (Pet. Br. at 3-4.) Institutions whose students receive BEOG awards must not only certify their attendance in good standing but must notify fed-

The interpretation here advanced was adopted in *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975),[16] holding that school was a recipient of "Federal financial assistance" within the meaning of Title VI under a Veterans Administration program strikingly similar to the BEOG program.[17] While this Court has never decided the

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eral officials of a student's change in enrollment status, as well as maintain certain records and make them available to federal officials upon request for audit purposes. *See* 43 Fed. Reg. 20922, 20927-28 (May 15, 1978); 44 Fed. Reg. 5258 (Jan. 25, 1979); 34 C.F.R. §§ 690.94, 690.95, 690.96 (1982). In addition, since 1980 these institutions have had mandatory obligations to provide information to all prospective and admitted students about all financial assistance programs available, 20 U.S.C. § 1092, and to enter into a specific "program participation agreement" with the Secretary of Education, 20 U.S.C. § 1094(a); 34 C.F.R. § 668.11 (1982).

[16] Petitioners' argument that *Bob Jones* is inapposite because that case involved race discrimination in the admissions process and because Title IX lacks the constitutional scope of Title VI (Pet. Br. at 35-36) is without merit. The *Bob Jones* decision is based on a common-sense interpretation of the language of Title VI and analysis of how the government aid to students in that case assisted the university. The court cited the constitutional scope of Title VI merely as an additional, but by no means the central, argument for its conclusion. The fact that the case involved discrimination in the admissions process was not the determinative factor in the court's conclusion that the school received Federal financial assistance.

[17] As the court there recognized,

> The method of payment does not determine the result; the literal language of Section 601 requires only federal assistance —not payment—to a program or activity for Title VI to attach . . . .
>
> [A]ll that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the school.

396 F. Supp. at 602, 603 n.22. Petitioners criticize the ruling below and, implicitly, the *Bob Jones* court (upon whose decision the Third Circuit relied in part) on the ground that it equated "receiving" federal financial assistance with "benefiting" from such assistance. (Pet. Br. at 15-17.) However, a careful reading of both

precise issue, its rulings in other areas demonstrate that the formal mechanism by which assistance is made available is not legally controlling. For example, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court concluded that a state program for the loan of textbooks to schoolchildren cannot constitutionally provide textbooks to students attending racially discriminatory private schools since

> [f]ree textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the state, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination.

Id. at 463-65 (citation and footnote omitted). Similarly, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), a New York law providing tuition reimbursements to parents of children attending nonpublic schools was overturned on the ground that the statute had the effect of subsidizing and advancing the religious mission of sectarian schools and thus violated the Establishment Clause. The Court dismissed the argument made by proponents of the statute that since the aid was granted to parents and not to the schools, the Constitution was not violated: "[T]he effect of the aid is unmistakably to pro-

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opinions indicates that both courts considered whether the schools "benefited" from the award of educational grants to their students as a means of determining whether the schools were "assisted," not whether they were "recipients." Here, the BEOG awards made it possible for the individual petitioners to attend Grove City College (*see* note 14 *supra*) and assisted the school in receiving payment of tuition and related charges for these students.

vide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.[18]

B. This Construction of the Statutory Language Accords with its Consistent Interpretation by the Department of Health, Education & Welfare and the Department of Education

Since passage of Title VI and Title IX, respectively, the federal agencies responsible for their implementation have consistently interpreted these provisions to apply to institutions of higher education whose students receive scholarship or loan assistance to enable them to attend the schools. Appendix A to the initial Title VI regulations,[19] which identified programs to which the regulations were applicable, included several making assistance available through payments to students,[20] and the current listing

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[18] While *Nyquist* was distinguished in *Mueller v. Allen*, 51 U.S.L.W. 5050 (U.S. June 29, 1983) (upholding, under the Establishment Clause, a state law provision making tax deductions for certain educational expenditures available to parents of both public and private school students), the Court recognized that the tax deductions constituted governmental assistance to the schools, since they were available only for specified educational expenses such as tuition. *See id.* at 5053. The Minnesota scheme survived an Establishment Clause challenge because its "primary effect" was not to aid parochial schools—not because there was no aid at all to parochial schools. *See id.* at 5053-54.

[19] "The Justice Department, which had helped draft the language of Title VI, participated heavily in preparing the regulations." *Guardians Ass'n v. Civil Service Comm'n*, 51 U.S.L.W. 5105, 5115 (U.S. July 1, 1983) (Marshall, J., dissenting) (footnotes omitted).

[20] *See* 29 Fed. Reg. 16298, 16304 (December 4, 1964); 45 C.F.R. at 93-94 (1967); *see also Grove City College v. Bell*, 687 F.2d 684, 691-92 n.14 (3d Cir. 1982). For example, under Title II of the NDEA the federal government made capital contributions to separate student loan funds to be established and administered by institutions of higher education—not to the schools themselves. The loan funds were to be used only for specified purposes and their assets could not be transferred to the institutions except under circumstances explicitly detailed in the statute. *See* §§ 201, 204-06,

of programs covered by Title VI includes both BEOGs and NDEA loans.[21] Similarly, the Title IX regulations initially issued by the Department of Health, Education & Welfare (and all succeeding versions of those regulations promulgated by HEW or the Department of Education) explicitly define "Federal financial assistance" to include:

> Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.[22]

This contemporaneous and consistent interpretation of the statutory provisions[23] is entitled to great deference, especially on the issue of the administrative agency's scope of authority. *See Guardians Association v. Civil Service Commission*, 51 U.S.L.W. 5105, 5108 text at nn.13, 14 (U.S. July 1, 1983) (opinion of White, J.), and case cited; *id.* at 5115-16 (Marshall, J., dissenting), and cases cited; *id.* at 5122 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting), and cases cited.[24]

NDEA, *reprinted in* 1958 U.S. Code Cong. & Ad. News 1898-1902. Nevertheless, the Congress recognized that the loan funds would "materially assist institutions of higher education to retain their more competent students who need financial assistance in order to continue their studies." H.R. Rep. No. 2157, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News 4731, 4738.

[21] 34 C.F.R. at 312-13 (1982).

[22] 40 Fed. Reg. 24128, 24137 (§ 86.2(g)(1)(ii)) (June 4, 1975); 34 C.F.R. § 106.2(g)(1)(ii) (1982).

[23] Unlike in *North Haven*, *see* 456 U.S. at 522 n.12, 538 n.29, the administrative agencies have not changed their position with respect to the portions of the regulations relevant to this discussion.

[24] Petitioners focus on the "or benefits from" language contained in the Title IX regulations' definition of "recipient." (Pet. Br. at 16-17.) The critical portion of the regulation, however, is its characterization as a "recipient" of an entity to which assistance is extended "through another recipient." That portion of the regulation is identical to the original Title VI regulation. *Compare*

C. The Legislative History of Title IX and that of Title VI Supports the Conclusion that Title IX Applies to Grove City College Because Its Students Were Awarded BEOGs

The legislative history of Title IX and of the statute on which it was modeled, Title VI, provides further support for the conclusion that the BEOG grants awarded to Grove City students are sufficient to bring that institution within the purview of Title IX.

1. *The Legislative History of Title IX*

Senator Bayh introduced the original version of Title IX as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971. Senator McGovern urged passage of the Bayh amendment ". . . to assure that no funds from S. 659 . . . be extended to any institution that practices biased admission or educational policies." 117 Cong. Rec. 30158-59 (1971).[25] Senator Mc-

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40 Fed. Reg. 24128, 24137 (§ 86.2(h)) (June 4, 1975) *with* 29 Fed. Reg. 16298 (December 4, 1964), as corrected by 29 Fed. Reg. 16988 (December 11, 1964) (§ 80.13(h)); *compare* 34 C.F.R. § 106.2(h) (1982) *with* 34 C.F.R. § 100.13(h) (1982). Moreover, when the Title IX regulations were promulgated in final form the *Bob Jones University v. Johnson* decision, which articulated a "benefit from" test to determine whether a school was a recipient of "assistance" under Title VI (*see* p. 9 & nn.16, 17 *supra*) had been issued. The Department of Health, Education & Welfare relied upon this interpretation by the court when it added the "benefit from" language to the definition of "recipient." *See Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 481 (1975).

[25] Contrary to what petitioners argue (*see* Pet. Br. at 22-23), many of the remarks of legislators regarding the 1971 amendment, including those of Senator McGovern quoted above, are equally applicable to the 1972 Bayh amendment, which became Title IX. Senator Bayh said in presenting his 1972 amendment: "Now I am coming back with this comprehensive approach which incorporates . . . the key provisions of my earlier amendment." 118 Cong. Rec. 5808 (1972). Although the wording of the 1972 amendment differs in many respects from the wording of the 1971 proposed amend-

Govern's remarks directly applied to the BEOG program, which was part of S. 659.

Although the antidiscrimination provisions did not come to a vote that year, in 1972 Senator Bayh reintroduced them in a modified form and secured their passage. Prior to their enactment, however, Senator Bentsen offered an amendment seeking to exempt traditionally single-sex public undergraduate institutions from Title IX coverage. In describing the purpose of his amendment, Senator Bentsen demonstrated his understanding that Title IX applied when grants were made to students to support their attendance at college. Referring to a particular single-sex institution, he observed:

> If Federal funds are cut off, it is the students who will suffer. This university now receives over $250,000 in educational opportunity grants; it receives $83,000 for college work-study programs.

118 Cong. Rec. 5814 (1972). *See also* H.R. Rep. No. 92-554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2584 ("Federal dollars now constitute over 20% of the total budget of our higher

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ment, the concept at issue, "recipient of Federal financial assistance," was part of both amendments. The differences between the two versions which petitioners point out are not relevant to interpreting the term "recipient." For example, petitioners emphasize that the 1971 amendment did not reach private undergraduate schools, and based upon this fact, assert that comments during the 1971 floor debates concerned "public institutions which were unquestionably receiving substantial direct federal assistance and were not intended to apply to private undergraduate institutions like Grove City." (Pet. Br. at 23.) But petitioners cite no floor statements or other authority to support either their characterization of Congressional intent or their surmise of Congressional knowledge about funding patterns. In fact, when in 1972 Title IX was enacted in a form applicable to private as well as public institutions, it was accompanied by a Committee report and supplemental views which recognized the major support provided to all higher education institutions by the federal government. *See* text *infra*.

education system. Most of these dollars *flow to institutions through* research contracts, *student assistance programs*, and categorical programs . . . .") (emphasis added) (Supplemental Views).

Thus, during the Committee and floor consideration of Title IX, Senators and Congressmen recognized that the statute would apply to educational institutions receiving federal assistance through BEOG grants to their students. Petitioners have been unable to discover any clear indications to the contrary in the legislative history, and obviously if Congress had wished to limit the coverage of Title IX to educational institutions receiving cash payments from the federal government, it could have done so explicitly. Moreover, the legislative history reflects the intent of Congress to enact a statute which would prevent ". . . the use of federal resources to support discriminatory practices," *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).[26]

Petitioners cite an exchange between Senator Dominick and Senator Bayh during the debates over the 1971 amendment which, they argue, "strongly suggests" that the amendment was not intended to cover assistance received directly by students. (*See* Pet. Br. at 24-25.) Senator Bayh's statements during this exchange, which concerned the type of a recipient's aid that could be cut off under Title IX, are at best ambiguous. Petitioners assume that Senator Bayh meant that his amendment would not allow cutting off of student aid, but the more plausible reading of his comments is that as a matter of law,

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[26] *See* 117 Cong. Rec. 39252 ("Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access") (remarks of Rep. Mink); *id.* at 39253 ("Neither the President nor the Congress nor the conscience of the nation can permit money which comes from all the people to be used in a way which discriminates against some of the people") (remarks of Rep. Sullivan, quoting President Nixon).

the Secretary would have the power to cut off student aid but as a matter of good judgment would most probably not do so.[27] In order to support their interpretation of the exchange, petitioners are forced to hypothesize that "Senator Bayh later changed his mind" on this issue. (Pet. Br. at 25 n.23.)

2. *The Legislative History of Title VI*

Since Title IX is closely and deliberately patterned after Title VI,[28] the legislative history of Title VI provides insight into how to interpret Title IX. This legislative history is consistent with Title IX coverage of educational institutions whose students receive BEOGs.

As previously noted, Senator Hubert Humphrey, a primary sponsor of the 1964 Civil Rights Act, argued in floor debate on the Act that "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent *in any fashion which encourages, subsidizes, or results* in racial discrimination," 110 Cong.

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[27] Petitioners advance an even less supportable reading of Senator Bayh's 1975 colloquy with Representative Quie during hearings on the Title IX regulations. (Pet. Br. at 25.) Senator Bayh first said he simply did not know the answer to Rep. Quie's coverage question, but "would have to look it up." He then echoed his 1971 answer to Senator Dominick by stating that "generally" student aid was not terminated as a penalty for uncorrected discrimination. Finally, Senator Bayh told Mr. Quie that he had not heard the argument for coverage based on student assistance to which Quie referred. What these statements teach about Congressional intent in 1972 is highly questionable.

[28] Senator Bayh, the prime sponsor of Title IX, described the relation between the two statutes as follows:

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI.

118 Cong. Rec. 5807 (1972).

Rec. 6543 (1964) (emphasis added). The then Secretary of HEW, Anthony Celebrezze, testified before the House Judiciary Committee that Title VI would allow cut-off of federal contributions to student loan funds under the National Defense Education Act, 20 U.S.C. § 401 *et seq.* *Civil Rights Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess. 1541 (1963). Congressmen Poff and Cramer, expressing their opposition to passage of the Act, drew up a list of programs that would be covered by Title VI which included programs involving grants or awards to students. *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer) *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2471-73.[29] Petitioners cite no expressions of disagreement by legislators with these descriptions of the scope of Title VI.

Instead, petitioners merely make generalized claims that such indications of student assistance coverage in the Title VI legislative history are inapplicabl to Title IX. As we describe in the margin, these claims are without merit.[30] Thus, the legislative history of Title IX and

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[29] The list included 42 U.S.C. § 242g (1970) (repealed by Pub. L. No. 94-484, § 503(b) (1976)) (grants to individuals or institutions for graduate training for physicians, engineers, nurses and other professional personnel) and 20 U.S.C. §§ 461-65 (graduate fellowships).

[30] First, petitioners argue that because Title IX is more limited in scope than Title VI, "[s]ome broad pronouncements in the Title VI legislative history simply do not apply to Title IX." (Pet. Br. at 28.) Aside from failing to point out what these broad pronouncements are, petitioners ignore the fact that the broad goals underlying Title IX—goals similar to those of Title VI—also sparked similarly broad pronouncements. (*See* the remarks of Senator McGovern and Representatives Mink and Sullivan, *supra* p. 13 and note 26.)

Second, petitioners claim that there is some significance to the fact that the BEOG program was not in existence at the time when

Title VI, interpreted in light of the clear remedial purpose of both statutes, supports a broad reading of Title

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Title VI was enacted and that federal funds under the student assistance programs then extant went first to educational institutions ". . . which had the discretion to choose the ultimate student beneficiary." (Pet. Br. at 29.) We have previously observed both that NDEA loan monies were placed in special funds and not in institutional accounts, and also that when NDEA was enacted, Congress recognized that the loans would assist institutions as well as students (*see* note 20 *supra*). While the BEOG program does have a different administrative structure from programs in effect in 1964, it is nevertheless similar in the sense that institutions have a role in selecting grant recipients because they make admittance decisions and are in possession of student financial information revealing whether or not an applicant will need financial aid in order to meet the institution's costs. There is no basis for petitioners' assumption that Congress would have excluded BEOGs from Title VI had the program existed in 1964—especially in light of the defeat of post-1975 attempts to so limit Title IX, *see* pp. 20-21 *infra*.

Third, petitioners make much of differences between the original and final versions of Title VI. (*See* Pet. Br. at 29-30.) We addressed this point in note 8 *supra*.

Fourth, petitioners cite a number of instances when legislators stated that Title VI would not cover direct payments to individuals. (*See* Pet. Br. at 31-33.) In context, these remarks are best understood to relate to entirely different sorts of programs than BEOGs. The instant case differs from a situation in which a college enrolls students receiving food stamps, child welfare payments, or other non-education benefits. *See* Brief of *Amici Curiae*, Mountain States Legal Foundation and American Association of Presidents of Independent Colleges and Universities, at 9-10. Participation in a student aid program is contingent upon the student's being in attendance at an educational institution. The other benefit programs provide individual assistance regardless of whether the person goes to school and thus are not intended to assist educational institutions.

Finally, petitioners argue that student assistance under the BEOG program is virtually unrestricted and the nexus between student receipt of the funds and assistance to the institution therefore is attenuated. (*See* Pet. Br. at 33.) We have noted previously that the use of BEOG awards by students is far more narrowly circumscribed than petitioners admit. *See* p. 8 *supra*. The nexus between BEOG awards to students and aid to institutions is strong, direct, and clear.

IX. Applying Title IX to Grove City College is consistent with the Congressional purposes underlying Title IX.

D. The Post-enactment History of Title IX Demonstrates the Congressional Intent to Apply Title IX to Institutions Assisted Through Direct Student Grants

In *North Haven*, this Court, in interpreting Title IX, stressed the importance of post-enactment developments. *See* 456 U.S. at 535. *Accord, Bob Jones University v. United States*, 51 U.S.L.W. 4593, 4600-01 (U.S. May 24, 1983); *Guardians Association v. Civil Service Commission*, 51 U.S.L.W. 5108 text at n.14 (opinion of White, J.); *id.* at 5116 (Marshall, J., dissenting). An examination of the post-enactment history of Title IX shows that Congress knew that HEW interpreted Title IX to encompass educational institutions whose students received federal BEOG grants, approved that interpretation, and allowed it to stand although it amended Title IX in other respects on several occasions.[31]

In 1975, HEW submitted its recently promulgated Title IX regulations to Congress for review pursuant to § 431(d)(1) of the General Education Provisions Act, 20 U.S.C. § 1232(d)(1). (This statute provided Congress with an opportunity to disapprove a regulation by concurrent resolution[32] if it found that the regulation was ". . . inconsistent with the Act from which it derives its authority.") Included among the regulations were HEW's definitions of "Federal financial assistance" and "recipient." *See* p. 12 & n.24 *supra*. During hearings on the regulations, HEW Secretary Weinberger brought the

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[31] *See* Pub. L. No. 93-568, § 3, 88 Stat. 2138 (1974); Pub. L. No. 94-482, § 412, 90 Stat. 2234 (1976).

[32] *But see INS v. Chadha*, 51 U.S.L.W. 4907 (U.S. June 23, 1983). The constitutional infirmity of the legislative veto provision of course does not affect the relevance of the 1975 review of the Title IX regulations as an indication of Congressional intent or post-enactment ratification of the agency's interpretation.

matter of coverage of student assistance directly to the legislators' attention:

> Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.
>
> As Mr. Rhinelander [HEW General Counsel] says the court case [*Bob Jones University v. Johnson*] confirms this belief.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 484 (1975). None of the concurrent resolutions to disapprove the Title IX regulations which were introduced in the House passed that body.

In the other chamber, Senator Helms attempted to persuade his colleagues that the Department's interpretation was incorrect but he failed to do so. His proposed resolution disapproving regulations that were not limited in application to programs and activities directly receiving federal financial assistance never reached the Senate floor for a vote. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17300 (1975).[33] Senators Helms also proposed a bill that would have limited application of Title IX to direct recipients of federal funds (S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23847 (1975)). It was never passed.

In 1976, Senator McClure renewed the attempt to limit Title IX by introducing an amendment defining federal financial assistance as assistance that an institution re-

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[33] This Court remarked in *North Haven*: "[T]he relatively insubstantial interest given the resolutions of disapproval that were introduced [including the Helms resolution] seems particularly significant since Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute." 456 U.S. at 534 (footnote omitted).

ceives directly from the federal government. 122 Cong. Rec. 28144. The stated purpose of the amendment was to eliminate HEW regulation of institutions where ". . . the only Federal involvement is the aid that a student may get." *Id.* Senator Pell, the major Senate sponsor of the provisions of the Education Amendments of 1972 providing for educational opportunity grants, challenged the McClure proposal: "[T]he enactment of this amendment would mean that no funds under the basic grant program would be covered by Title IX. While these dollars are paid to students they flow through and ultimately go to institutions of higher education and *I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.*" *Id.* at 28145 (1976) (emphasis added).[34] The McClure amendment was rejected. *Id.* at 28147.

The post-enactment history of Title IX thus shows that Congress realized that HEW interpreted Title IX to encompass educational institutions whose students received BEOGs. Congress' rejection of legislative challenges to that interpretation, when viewed in light of its willingness to amend Title IX in other respects, strongly supports the conclusion that Title IX coverage of schools assisted by the BEOG grant program is in accord with Congressional intent. As this Court remarked in *North Haven*:

> Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute

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[34] Senator Bayh supported Senator Pell: "The courts have held that Title VI of the Civil Rights Act does apply if a student receives Federal aid. If a student is benefited, the school is benefited. It is not new law; it is traditional, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students." 122 Cong. Rec. 28145-46 (1976).

in other respects, then presumably the legislative intent has been correctly discerned."

456 U.S. at 535 (citations omitted).

II

AS A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE THROUGH THE BEOG PROGRAM, GROVE CITY COLLEGE MAY PROPERLY BE REQUIRED TO EXECUTE AN ASSURANCE OF COMPLIANCE WITH TITLE IX

Petitioners' second major argument is that Grove City College may not be required to execute the Department of Education's Assurance of Compliance ("Assurance")[35] because the school would thereby be submitting to institution-wide Title IX coverage in violation of the statute's "program specificity," *see North Haven*, 456 U.S. at 536. This argument fails for two reasons: first, the Assurance and the applicable regulations meet *North Haven*'s test of program specificity; and second, because BEOGs assist the institution's entire program, Title IX applies to that entire program.

A. The Title IX Assurance and Applicable Regulations Are "Program-Specific" as Required by *North Haven*

In *North Haven*, this Court held that not only the funding termination provisions of § 902, but also that section's grant of regulatory authority to the Department of Education and the § 901 prohibition against sex discrimination, are "program-specific." 456 U.S. at 536-38. It is thus apparent that the Assurance which the Department of Education requires that Grove City execute, and the portions of the Title IX regulations applicable thereto, must be examined to determine if they are consistent with Title IX's program specificity.

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[35] The Assurance of Compliance is a written acknowledgement by a recipient of Federal financial assistance that it will operate its education programs or activities in a manner consistent with applicable Title IX regulations. 34 C.F.R. § 106.4 (1982).

North Haven provides guidance in this examination. There, the Court reviewed Subpart E (Employment) of the Title IX regulations and found it to be adequately program-specific. The Court held that although the "employment regulations do speak in general terms of an educational institution's employment practices, . . . they are limited by the provision that states their general purpose"—§ 106.1 of the Title IX regulations, which refers to the "program or activity" language in the statute. *Id.* at 538. *See* 34 C.F.R. § 106.1 (1982). In addition, the Court noted, the Department's comments accompanying publication of its final Title IX regulations, by citing *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), indicated the agency's intent that the regulations be interpreted in a program-specific manner. *North Haven*, 456 U.S. at 538-39.

Applying the *North Haven* analysis to the present case, it is clear that the regulations and the Assurance itself, HEW Form 639, conform to the program-specific language of the Title IX statute. Under the Assurance, an institution receiving federal assistance pledges to "[c]omply, *to the extent applicable to it*, with Title IX . . . and all requirements imposed by . . . the Department's regulations . . . to the end that, in accordance with Title IX . . . no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any *education programs or activity* for which the applicant receives or benefits from federal financial assistance." HEW Form 639 (emphasis added). The Assurance, by limiting compliance to "the extent" Title IX applies to the institution and to "programs or activity," explicitly announces its conformity with the statute's program-specificity.

In addition, the regulations limit the institution's obligation to comply with Title IX to "each education *program or activity* operated by the applicant or recipient and to which this part [the Title IX regulations] applies." 34 C.F.R. § 106.4(a) (1982) (emphasis added). Finally,

these portions of the regulations are also subject to the general purpose section, § 106.1, which this Court found adequately program-specific in *North Haven*, 456 U.S. at 538.

Just as this Court in *North Haven* rejected claims that the employment regulations of Title IX were inconsistent with the statute's program-specificity, so too, must the Court reject petitioners' claims that the Assurance and regulations are not program-specific.[36] As the Court explained, "regulations may be broadly worded and need not be directed at specific programs—as long as they are applied only to programs that receive federal funds." 456 U.S. at 536 n.27.[37]

B. Because BEOG Grants Provide Assistance to the Entire Program of Grove City College, that Entire Program of the Institution is Covered by Title IX

We have suggested above that the Court is not required in this case to attempt a general definition of "program or activity," as the term is used in § 901(a), because,

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[36] All that is at issue in this case is the Assurance. The Department has not made any findings concerning the program(s) or activity(ies) at Grove City College which are covered by Title IX or its regulations. Neither the district court nor the ALJ deemed it necessary to address the meaning of "program or activity" in relation to Grove City. Thus, we agree with Judge Becker, concurring below, that it was unnecessary for the panel majority to explore the subject.

[37] Petitioners' argument that the Department may not terminate federal funding to a recipient which refuses to execute an Assurance is baseless. The Assurance requirement is well within the agency's authority under § 902 to adopt regulations "of general applicability." As the Third Circuit panel noted, the Assurance not only identifies the type of institution applying for federal aid, but also asks the school to provide information respecting grievance complaint procedures, requires a statement of self-evaluation concerning the practices of the institution, and places the recipient on notice that it must comply with Title IX and its regulations. 687 F.2d at 703. As such, the Court of Appeals found that the Assurance constituted a threshhold device facilitating the enforcement of Title IX's objectives. *Id.*

just as in *North Haven*, the Assurance and regulations are adequately limited by the program-specificity concept.[38] Even if the Court does not rest upon this ground, however, it should affirm the judgment below since under the specific facts of this case, the Third Circuit was correct in holding that all of Grove City College is subject to Title IX's prohibition against sex discrimination.[39]

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[38] In *North Haven*, two local boards of education sought declaratory and injunctive relief in situations where the Department of Education had begun complaint investigations. Although the investigation stage is much further along the continuum of the enforcement scheme than the point at which an institution is asked to complete an Assurance, this Court did not find it necessary to define "program or activity."

[39] We recognize that in *North Haven* this Court apparently rejected a reading of § 901(a) which would extend its reach to an entire institution in every instance. 456 U.S. at 537. There is no need to revisit that determination in the present case. But there is likewise no basis upon which to conclude, as petitioners argue, that by implication the Court in *North Haven* was holding that § 901(a) could *never* reach an entire institution.

Petitioners offer no coherent interpretation of § 901(a). On the one hand, they suggest that the statutory language must refer to something less than the entire program of an institution (*see* Pet. Br. at 14-15). On the other hand, petitioners concede (*id.* at 20 n.18) the validity of the "infection" theory of *Board of Public Instruction v. Finch*, which holds that federal funds may be terminated under Title VI if discrimination in other areas of a recipient's operations "infects" a federally supported categorical program. Necessarily, then, the scope of § 901(a) must be at least broad enough to reach any part of a recipient's operations which, if conducted in a discriminatory manner, might "infect" a "program or activity receiving Federal financial assistance," as petitioners narrowly define that term. *Cf. Iron Arrow Honor Society v. Heckler*, 702 F.2d 549 (5th Cir. 1983).

Thus, to use an example proffered by petitioners (*see* Pet. Br. at 20), if a university received federal funds to support a program of research and instruction in chemistry (to advance an overall Congressional goal of increasing the nation's supply of qualified scientists), it would clearly be a violation of Title IX if the school permitted women to enroll in that program but required that they

In Part I of this brief, we described the purposes of the Higher Education Act in general and the BEOG program specifically. *See* p. 7 *supra*. BEOGs provide students with the means to obtain undergraduate degrees, and assist institutions of higher education to provide the necessary instruction and related services and activities to that end.[40] The system of channeling aid through the student, and of allowing the student to select the institution which he or she will attend, provides a means of preserving the institutional autonomy sought by Grove City College (*see* Pet. Br. at 47-50). At the same time, it necessarily means that BEOG funds, which must be used for tuition, fees and other expenses associated with attendance at the school that the student has chosen, support whatever functions or activities the *institution* determines to offer as part of undergraduate education.

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take a greater number of credits in other courses to earn an M.S. or Ph.D. degree than it required of male students in the program. Similarly, disparate treatment based on sex in such other areas of a program enrollee's necessary contact with the institution as residential accommodations, honors, or extracurricular activities would obviously be proscribed by Title IX.

Petitioners also suggest, citing *Finch*, that "the concept of a recipient program or activity under Title IX must be co-extensive with the scope of the underlying grant statute" (Pet. Br. at 20). We have explained in this footnote why this formula cannot mark the outer limits of § 901(a) under the *Finch* "infection" theory. But even accepting the formula *arguendo* for purposes of this case, it leads to the conclusion (for the reasons stated in the text, *infra*) that all of Grove City's operations are subject to Title IX.

[40] The purpose of the BEOG program is *not*, as petitioners suggest, to enable Grove City College or any other school to operate a student assistance program. There are federal grant-in-aid statutes which do provide such assistance. For example, under 20 U.S.C. § 427 (NDEA), the federal government will loan money directly to an institution to enable it to meet its required 10% match and to establish a student loan fund eligible for federal capital contributions. And under 20 U.S.C. § 1070e, an institution may receive federal payments to defray its expenses in administering BEOGs.

There is no dispute in this case that without their BEOGs, the individual petitioners would be unable to attend Grove City. Hence there is no question that BEOG funds are effectively used to pay tuition and fees charges, and become part of the general operating funds of the college. Absent a showing that it conducts administratively and programmatically separate, specialized activities which are not related to undergraduate education, the costs of which are defrayed from separate funds, and which do not in any way benefit from the BEOG assistance to the school, all of Grove City's operations are subject to Title IX. The entire program of Grove City College is the "education program or activity receiving Federal financial assistance" through BEOGs.

This interpretation of § 901(a), where an institution benefits from its students' BEOG awards, is supported by the statutory framework, the legislative history of Title IX, the similar treatment of general-purpose aid under Title VI, and events following upon the issuance of the initial Title IX regulations in 1975. *First*, § 901(a) also contains a series of specific exclusions from Title IX coverage, many of which cover events or functions which are very unlikely ever to receive earmarked federal support. Unless Congress contemplated that at least in some circumstances (such as where an institution receives assistance for its overall educational program through student aid grants) the scope of § 901(a) would be institutionwide, there would be no reason to enact these provisions.[41] *Second*, the principal sponsor of Title IX, Senator Bayh, explicitly described the broad scope of Title IX, emphasizing that it would reach any part of an institution's operations which could affect federal program participants.[42] *Third*, when Title IX was enacted, at least

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[41] *See Haffer v. Temple University*, 524 F. Supp. 531, 541 (E.D. Pa.), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

[42] When asked whether the language "any program or activity" would reach "dormitory facilities . . . athletic facilities . . . or . . . just educational requirements," Bayh responded that "[w]hat we

one federal court had already construed similar "program or activity" language broadly with respect to an entity receiving general support funds.[43] *Finally*, when Congress reviewed the Title IX regulations issued by the Department of HEW in 1975, there was major controversy and debate over the prohibition of discrimination in extra-curricular athletic programs; however, the regulations were not disapproved and in fact the Senate defeated a series of amendments which would have narrowed the scope of § 901(a)'s prohibition on discrimination.[44]

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are trying to do is provide equal access for women and men students to the educational process and the extra-curricular activities in a school . . . ." 117 Cong. Rec. 30407 (1971).

[43] In *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967), a school district received funds for construction and operations because of the location within the district of an air force base. The court held that acceptance of these "impact aid" funds after enactment of Title VI "brought its school system within the class of programs subject to the section 601 prohibition against discrimination." *Id.* at 852. Senator Bayh indicated in 1975 that the "program or activity" language of Title IX had been intended to parallel the *Bossier Parish* interpretation of Title VI. 121 Cong. Rec. 20468 (1975). *See also Bob Jones University v. Johnson*, discussed *supra* p. 9.

[44] *See* 120 Cong. Rec. 15322 (1974) (Tower amendment to exclude "revenue producing" intercollegiate athletics); 121 Cong. Rec. 23845 (1975) (Helms amendment to exclude programs and activities not receiving direct federal aid); 122 Cong. Rec. 28136 (1976) (McClure amendment to redefine "program or activity" to include only curriculum or graduation requirements). Senator Bayh successfully opposed the amendments on the ground that they would have exempted "areas of traditional discrimination against women that are the reason for the . . . enactment of Title IX [including] . . . scholarship . . . employment . . . and extra-curriculum [sic] activities such as athletics." *Id.* at 28144.

Senator Bayh testified at the House of Representatives hearings on the Title IX regulations in a similar fashion:

> This objection to the coverage of programs which receive indirect benefits from federal support—such as athletics—is directly at odds with the Congressional intent to provide coverage of exactly such types of clear discrimination. For ex-

Petitioners' argument that an educational institution can never be a "program or activity" for purposes of Title IX leads to an absurd result: institutions that receive general support funds such as BEOGs would never be covered by Title IX and would be able to use these funds to support discriminatory programs. There is no evidence that Congress intended to establish such a loophole in Title IX enforcement. Given Congress' intent in enacting Title IX, "program or activity" should be liberally interpreted in a common-sense fashion that best effectuates the purposes of Title IX: to protect citizens from discrimination and to eliminate federal financial support for such discrimination.

The federal government, by providing students at an undergraduate institution with federal educational grants, is also providing the institution as a whole with additional resources which the institution may allocate as it sees fit. In order to effectuate the remedial purposes of Title IX, the Third Circuit's decision that the entire program of Grove City College is the "program or activity receiving Federal financial assistance" should be upheld.

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ample, although federal money does not go directly to the football programs, federal aid to any of the school system's programs frees other money for use in athletics.

Without federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to federal financial assistance. If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 171 (1975).

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GROVE CITY COLLEGE, *et al.*,
Petitioners,

v.

TERRELL H. BELL, SECRETARY OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL CHICANO COUNCIL OF HIGHER EDUCATION, THE HISPANIC HIGHER EDUCATION COALITION, RAZA ADMINISTRATORS AND COUNSELORS IN HIGHER EDUCATION, TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, IN SUPPORT OF THE JUDGMENT BELOW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-792

GROVE CITY COLLEGE, *et al.*,
Petitioners,

v.

TERRELL H. BELL, SECRETARY OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL CHICANO COUNCIL OF HIGHER EDUCATION, THE HISPANIC HIGHER EDUCATION COALITION, RAZA ADMINISTRATORS AND COUNSELORS IN HIGHER EDUCATION, TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF *AMICUS CURIAE*

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968. A major purpose of the organization since its inception has

been to end discrimination against Spanish-speaking persons in education, employment, and other similar contexts. To this end, MALDEF has represented Spanish-speaking students in more than a dozen cases involving equal access to education, and has participated as an *amicus curiae* in numerous cases before this Court. *E.g., Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). MALDEF has a strong interest in the outcome of this case because of the effect it may have on equal access to education, and because the Court's construction of Title IX will likely have an impact on the interpretation of closely related statutes, including Title VI, which directly affect the opportunities afforded by federal grantees to Mexican Americans.

The National Chicano Council on Higher Education (NCCHE) was organized in 1975 and incorporated in 1977 for the purpose of developing programs and sponsoring projects aimed at increasing the participation of Hispanics in higher education. It is comprised of a nationwide council of more than 200 individuals of Hispanic background involved as faculty and administrators in colleges and universities. In pursuit of NCCHE's goals, it has established fellowship programs, conferences, workshops, and institutes and undertaken specialized training and information dissemination on behalf of its members. In all of these activities, NCCHE has been guided by a commitment to equal access in all sectors of higher education. For this reason, NCCHE is vitally interested in this case because of its impact on access for minority students and how federal policy will affect such access.

The Hispanic Higher Education Coalition (HHEC) is a private, non-profit organization based in Washington, D.C., and composed of thirteen national Hispanic organizations. Since 1978, HHEC has been an advocate for the educational needs of the Hispanic population, especially at the postsecondary educational level. It has pursued these issues by identifying and advocating, at the federal level,

policies favorably affecting education access for Hispanic students. For this reason HHEC has an interest in federal policies aimed at ending discrimination against minority students and bringing about more minority student access.

Raza Administrators and Counselors in Higher Education (RACHE) is a California statewide organization established in 1975. RACHE is composed of faculty, staff, and other individuals working in postsecondary education institutions. RACHE's members are primarily of Hispanic descent and have extensive experience, interest, and expertise in federal policies aimed at making higher education more accessible to Mexican-American and other disadvantaged students. As such, RACHE has an organizational interest in ensuring that federal civil rights policies dealing with civil rights enforcement effectively prevent discrimination against minority students in colleges and universities.

The Texas Association of Chicanos in Higher Education (TACHE) is a Texas statewide organization of faculty and staff founded to provide a forum for dealing with issues related to Hispanics in Texas' higher education institutions. As such, TACHE has been actively involved in the problems and needs of Hispanics in higher education institutions, and has actively sought to enforce civil rights laws in Texas as they are applied to Texas' colleges and universities. For this reason TACHE has an interest in ensuring that federal civil rights enforcement will not be weakened or limited.

The League of United Latin American Citizens (LULAC) was founded in Texas in 1929 to promote the political, social, and economic rights of Hispanic people in the United States. LULAC is now the nation's oldest and largest Hispanic organization with members throughout the country working to provide equity in opportunity for all Hispanics. The League has been extensively involved in

the promotion of educational opportunities for Hispanics and has been especially active in the litigation of Hispanic desegregation cases and the development of bilingual education programs for Hispanics. In addition, LULAC has been responsible for the foundation of service centers across the United States which have recruited and counseled Hispanic students regarding higher education opportunities. For this reason LULAC is vitally interested in ensuring that civil rights policies in higher education are vigorously enforced.

MALDEF *et al.*, have obtained consent to file this brief from all parties of record, and the letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Petitioner's objection to federal jurisdiction over it is a serious threat to federal civil rights enforcement in education and other fields. As the United States Commission on Civil Rights recently explained:

> The immediate issue in *Grove City* is the extent of the Education Department's authority to enforce Title IX in higher education. The case raises larger issues, however. Nearly 30 Federal agencies have Title IX enforcement responsibilities. In addition to higher education, the law covers elementary, secondary, and adult education, as well as various federally-supported training programs. Moreover, it is linked by language, legislative history, and case law to Title VI, Section 504, and the Age Discrimination Act. A whole fabric of civil rights protections thus could be affected by *Grove City*.[1]

Contrary to Grove City's contention, nothing in the language of Title IX exempts educational institutions that receive federal subsidies "indirectly" through federal grants to their students. Rather, the anti-discrimination

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[1] U.S. Comm'n on Civil Rights, *Statement of the U.S. Commission on Civil Rights on Civil Rights Enforcement in Education* 2-3 (June 14, 1983).

rule in Title IX broadly applies whenever federal funds are "receiv[ed]" and Title IX makes no distinction between federal funds "receiv[ed]" directly and those "receiv[ed]" indirectly. This plain meaning of Title IX is also reinforced by its legislative history. Title IX was modeled on Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination. As this Court has recognized, Congress intended that Title IX be "applied as Title VI had been during the preceding eight years." *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979). Under Title VI, it had been the uniform interpretation of the agency administrators, the courts, and the commentators that Title VI applied to educational institutions that receive federal funds in the form of federal grants to their students. Thus, Grove City errs in contending that it can exempt itself from Title IX's anti-discrimination rule by choosing to receive federal funds indirectly through its students.

In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), this Court held that Title IX was program-specific, but did not decide the meaning of the "program or activity" limitation. Nor in this case need the Court reach the general question of the scope of "program or activity." At least in a case such as this, where the assistance is general, unearmarked aid that flows to the institution as a whole, the entire institution is the "education program or activity" from which discrimination is banned.

ARGUMENT

I. The National Policy Against Discrimination, as Reflected in Title IX, Applies to Any School That Receives Federal Subsidies, Whether Directly or Indirectly, Through Grants to its Students.

Title IX of the Education Amendments of 1972 [2] prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. Section 901(a) states in pertinent part that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681. Title IX was expressly modeled on Title VI of the Civil Rights Act of 1964,[3] which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. It was the intent of Congress in enacting Title IX to extend the prohibitions of Title VI to include discrimination on the basis of sex.

The language of the statute, its legislative history, and Congress' post-enactment review of administrative regulations demonstrate that Title IX prohibits discrimination in an institution that receives federal financial assistance through federal grants to its students.

A. *The Statutory Language.* The starting point for analysis must be the statutory language itself. *North Haven Board of Education v. Bell*, 456 U.S. 512, 520 (1982). Title IX sweepingly prohibits discrimination in

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[2] Pub. L. No. 92-313, 86 Stat. 235, 20 U.S.C. § 1681 *et seq.* (1976 & Supp. V 1981).

[3] Pub. L. No. 88-352, 78 Stat. 241, 252-53, 42 U.S.C. § 2000d *et seq.* (1976 & Supp. V 1981).

"any education program or activity receiving Federal financial assistance." The phrase "receiving Federal financial assistance" is not specially defined in Title IX and therefore must be given its "ordinary contemporary common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The statute thus requires a functional determination whether federal financial assistance is "receiv[ed]," irrespective of the manner of receipt. If such federal financial assistance is received, the statutory ban on sex discrimination is applicable.

Title IX makes no distinction between "receiving" federal funds directly and "receiving" federal funds indirectly. Thus, Petitioner's proposed exemption for entities that receive "indirect" federal financial assistance finds no support in the plain language of Title IX. Nothing in Title IX suggests that the manner by which a covered entity receives federal financial assistance is in any way relevant to the applicability of the anti-discrimination rule of Title IX. "Indirect" federal aid is just as much a benefit to a recipient institution as is a direct subsidy, and an institution which accepts this benefit is prohibited from discriminating. *Cf. Bob Jones University v. United States*, 103 S. Ct. 2017, 2028 (1983) (recognizing that an indirect benefit such as a tax exemption benefits a school as much as a direct federal grant).

Grove City is, in effect, asking this Court to read into Section 901(a) an additional word exempting from Title IX all schools which do not receive "direct" federal financial assistance. But Congress did not adopt any such exemption, although it did create nine other statutory exemptions in Section 901(a).[4] Nor may this Court now read into Title IX such an exemption which Congress did not include in the statute. *United States v. Turkette*,

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[4] *See* § 901(a)(1)-(9), 20 U.S.C. § 1681(a)(1)-(9). The sixth of the nine statutory exemptions was added in 1974 and the final three exemptions in 1976. *See North Haven*, 456 U.S. at 534 n.25.

452 U.S. 576, 580-88 (1981); *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Rasmussen*, 440 U.S. 29, 46-47 (1979).

Indeed, Petitioner's strained construction of Title IX to exempt recipients of "indirect" federal assistance creates an exemption which would virtually engulf the anti-discrimination rule, in contravention of the plain meaning and intent of Title IX. Given the extent to which federal assistance to higher education takes the form of indirect assistance, it strains reason to attribute to Congress an intention to exempt indirect assistance from the operation of Title IX in the absence of express language to that effect.[5] Indeed, in enacting the Education Amendments of 1972, of which Title IX was one part, Congress expressly legislated that federal financing for education would often be provided to schools through students or other intermediaries.[6] For instance, schools were given the

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[5] *The Catalog of Federal Domestic Assistance* describes numerous student aid programs. *See* Office of Management and Budget, Executive Office of the President, *1983 Catalog of Federal Domestic Assistance*. Many were already in force before enactment of Title IX, and the amount of funds involved was enormous. For example, in fiscal year 1972, $220.3 million was appropriated under the Supplemental Educational Opportunity Grant (SEOG) program alone. Staff of the Subcomm. on Postsecondary Education, 98th Cong., 1st Sess., *Report and Fiscal Year 1984 Budget Analysis of Programs Under the Jurisdiction of the Subcomm.* 31 (Comm. Print 1983). By 1982, the figure for SEOGs had grown to $355.4 million. *Id.*

[6] Expanded federal financial assistance included student grants (*see, e.g.*, § 131 of Title I, 20 U.S.C. §§ 1070 to 1070(d)-1 (amending § 401 of Title IV of the Higher Education Act of 1965)), and loans (*see, e.g.*, § 137(b) of Title I, 20 U.S.C. §§ 421-25 (amending Title IV of the Higher Education Act of 1965)), as well as grants for graduate and professional study (*see, e.g.*, § 181(a) of Title I, 20 U.S.C. §§ 1134 to 1134r (amending Title IX of the Higher Education Act of 1965)). In addition, there were new programs of direct assistance to higher educational institutions. *See, e.g.*, § 1001(a) of Title X, 20 U.S.C. §§ 1070e to 1070e-1 (amending §§ 419-420 of Title IV of the Higher Education Act of 1965). In

choice (as Grove City had with respect to federal Basic Educational Opportunity Grants (hereinafter BEOG), Pet. App. A-7) whether to receive those funds directly from the federal government and to credit eligible students for them, rather than to receive those funds from the students as tuition payments.[7]

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enacting the indirect assistance programs, Congress contemplated that the schools would ultimately receive, and thereby benefit from, the disbursement of federal monies. *See* H.R. Rep. No. 554, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2463 ("Testimony indicated that the higher education community is now facing extraordinary change made difficult by acute financial distress. . . . Institutions of higher education have sought federal assistance to enable them to meet responsibilities of the nation. This bill . . . attempts to meet that need both by extending and amending existing categorical programs and by accepting new federal roles particularly in regard to the general support of higher education institutions.") *See also* 118 Cong. Rec. 20,312 (1972) (Statement of President Isaac K. Beckes, Vincennes University; President Arthur Hansen, Purdue University; President John Pruis, Ball State University; President Alan Rankin, Indiana State University; and President John Ryan, Indiana University, that "The bill . . . would provide substantial support for the Indiana institutions we represent, particularly in student financial assistance and in institutional grants."); *id.* at 20,315 (letter from Kingman Brewster, Jr., Yale University, stating in pertinent part that "[T]he provisions relating to student and institutional support would go a long way toward helping all universities. . . ."); 117 Cong. Rec. 29,358 (1971) (statement of Sen. Kennedy that the programs are a "significant step forward" in providing "a greater measure of support to the colleges and universities in order to help them alleviate their increasing financial burdens which have developed over the past decade.").

[7] 20 U.S.C. § 1070a(c); 34 C.F.R. §§ 690.71, 690.78, 690.91; *see* Pet. App. A-7 to A-8 & nn. 8 & 9. *See, e.g.*, 20 U.S.C. § 1070a (federal program funds disbursed to students); § 1070b (Supplemental Educational Opportunity Grant program funds disbursed to schools); § 1070c (Grants to States for State Student Incentives program funds disbursed to States); § 1070d (Special Programs for Students from Disadvantaged Backgrounds funds disbursed to higher and postsecondary institutions).

However, nothing in the language of Title IX suggests that an individual school, by choosing to receive its federal assistance through its students, could thereby exempt itself from the discrimination ban of Title IX. To assume that Congress intended that the applicability of Title IX would depend upon the form in which colleges and universities choose to receive federal assistance would elevate mere matters of accounting form over the substantive civil rights protections of Title IX.[8] It would permit institutions to participate in federal assistance programs, but to "elect out" of Title IX coverage. Such a result, which would encourage institutions to structure receipt of federal assistance through intermediaries such as students, faculty, foundations, and the like, thereby evading federal civil rights enforcement, is the precise opposite of that intended by Congress.[9]

Both the plain meaning of the statutory phrase "receiving federal financial assistance" and the absence of the word "direct" preceding that phrase compel the conclusion that no form of educational aid, provided by the Education Amendments of 1972 or other acts, is exempt from the anti-discrimination provisions of Title IX because of the indirect method by which it is disbursed. Nor is any recipient of federal funds exempt from Title IX because of its choice of the manner in which it receives federal funds. Because Petitioner's construction of Title IX necessarily assumes that Congress was unaware

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[8] *Cf. Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602-03 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975) (Title VI).

[9] Indeed, Grove City concedes that its proposed exemption for "indirect" assistance goes too far and admits in a footnote that "[t]his is *not* to say that assistance which is provided through another recipient to an education program or activity is not within the scope of Title IX coverage." Pet. Br. at 17 n.17 (emphasis added). Having made this sweeping concession, Grove City has no principled basis to distinguish federal funds received through its students from federal funds received through other intermediaries which it concedes are subject to Title IX.

of how federal monies would be disbursed under these other provisions of the same Act, that construction flies in the face of common understanding and must be rejected. *See, e.g., Schweiker v. Hogan*, 102 S. Ct. 2597, 2608 (1982).

B. *The Legislative History.* The legislative history of Title IX also amply supports the plain meaning of the statutory terms "*receiving* Federal financial assistance" and compels the conclusion that Title IX's ban on sex discrimination applies whenever a school receives federal financial assistance from whatever source and in whatever manner. (Emphasis added.)[10]

Original Title X of H.R. 7248, 92d Cong., 1st Sess. (1971) contained, in § 1001, a prohibition of sex discrimination in federally-assisted education programs and activities identical to the current § 901(a).[11] While debate over the meaning of § 1001 was limited (117 Cong. Rec. 39,248-61), there was a stated legislative intent simply to extend the reach of Title VI of the 1964 Civil

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[10] While Title IX was enacted as part of S. 659, 92d Cong., 2d Sess. (1972), as an amendment thereto sponsored by Senator Bayh (Amendment No. 874, *reprinted in* 118 Cong. Rec. 5802, 5808 (1972)), there were earlier unsuccessful efforts to extend Title VI of the 1964 Civil Rights Act to prohibit gender discrimination. *See Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. pp. 1, 8-9 (1970) (reprinting bills). *See North Haven*, 456 U.S. at 523 n.13; *Cannon v. University of Chicago*, 441 U.S. 677, 694 n.16 (1979). In the Senate, Senator Bayh also introduced an anti-discrimination measure as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971 (117 Cong. Rec. 30,155-57 (1971). He characterized his amendment as "identical to . . . Title VI of the 1964 Civil Rights Act—forbidding discrimination in federally assisted programs. . . ." 117 Cong. Rec. 30,156. Ruled non-germane, the amendment never came to a vote. *Id.* at 30,415; *North Haven*, 456 U.S. at 523, n.13.

[11] 117 Cong. Rec. 39,255 (1971) (reprinting § 1001); *see* H.R. Rep. No. 554, 92d Cong., 1st Sess. p. 108 (1971).

Rights Act so as to encompass gender discrimination.[12] The House debate also makes plain that Section 1001 required schools participating in federally-funded programs to pursue a gender-neutral policy.[13]

Senator Bayh offered a similar proposal as an amendment to the Senate version of the Education Amendments of 1972 (*see* note 10, *supra*), basically to "clos[e] loopholes in existing legislation relating to general education programs and employment resulting" therefrom, because of the omission from Title VI of a ban on gender discrimination. 118 Cong. Rec. 5803 (1972). While this amendment contained a variety of provisions (*see North Haven*, 456 U.S. at 524), Senator Bayh stated that "the heart of this amendment is a provision banning sex discrimination in educational programs receiving federal funds" and providing "[e]nforcement powers . . . parallel to those found in Title VI." 118 Cong. Rec. 5803; *see id.* at 5805 (reprinting Amendment No. 874).

The sponsors of Title VI, whose views merit special attention when assessing congressional intent in Title IX, *see North Haven*, 456 U.S. at 525-28, also clearly intended that discrimination be prohibited wherever federal funds are used. As Senator Pastore put it, Title VI would "prevent . . . discrimination where Federal funds are involved. . . . The title has a simple purpose —to eliminate discrimination in federally-financed programs." 110 Cong. Rec. 7054-55 (1964). Senator Hum-

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[12] *See, e.g.*, 117 Cong. Rec. 39,252 (Rep. Mink) ("This is no new precedent. It is simply an extension of existing policy [under Title VI] not to fund programs with taxpayers' funds which deny any individual equal protection of the laws."); *id.* at 39,256 (Rep. Green).

[13] Several Members, both proponents and opponents of Title IX, stated that it would apply to schools participating in federally-funded programs such as those established by H.R. 7248. *See, e.g.*, *id.* at 39,251 (Rep. Green), 39,251-52 (Rep. Mink), 39,253 (Rep. Sullivan), 39,253 (Rep. Conte), 39,254 (Rep. Wyman), 39,260 (Rep. Erlenborn).

phrey quoted from President Kennedy's message to Congress on June 19, 1963, to emphasize the broad reach of the legislation: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in *any* fashion which encourages, entrenches, subsidizes, or results in racial discrimination." 110 Cong. Rec. 6543 (1964) (emphasis added).[14] Thus, Congress did not carve out any exception for "indirect" federal aid in enacting Title VI's prohibition of racial discrimination by those "receiving" federal financial assistance.

The courts have also long recognized that Title VI bans racial discrimination by universities that receive federal educational benefits through their students. *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). In *Bob Jones*, 221 of 4509 students received a total of $397,800 under Veterans Administration education programs. The court correctly concluded that:

> The method of payment does not determine the result; the literal language of Section 601 requires only federal assistance—not payment—to a program or activity for Title VI to attach . . . . Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in any event.

396 F. Supp. at 602, 603.[15] Because, as this Court has recognized, the drafters of Title IX explicitly assumed that

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[14] That the congressional intent, i.e., that "public funds . . . not be spent in any fashion" encompassed "indirect" federal assistance is apparent also from the statement of Congressman Winstead, in opposing Title VI, that "under this authority, this or any other administration could effectively withhold funds, under the guise of racial discrimination, from any project financed *directly* or *indirectly* by federal funds." 110 Cong. Rec. 1703 (1964).

[15] The court in *Bob Jones* also rejected the argument that Title VI was inapplicable because not all the federal aid received by

it would be interpreted "and applied as Title VI had been during the preceding eight years," *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979), Congress intended that the Title IX ban on sex discrimination apply to colleges, such as Grove City, that receive federal funds through their students.[16]

Petitioner errs in claiming that a statement of Senator Bayh "demonstrates an intent to exclude direct student aid from Title IX." Pet. Br. at 11. To the contrary, the colloquy (quoted in full at Pet. Br. at 24) demonstrates that Title IX does apply to "*all aid* that comes through the Department of Health, Education, and Welfare." Pet. Br. at 24, quoting 117 Cong. Rec. 30,408 (1971) (Sen. Bayh) (emphasis added). Senator Bayh added that when it comes to choosing *which* federal funds should be cut off, he assumed that HEW

> would be reasonable and would use only such leverage as was necessary against the institution. It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution, and the Secretary would be expected to use good judgment as to how much leverage to apply and where it could be applied.

Id. Thus, Senator Bayh clearly drew a distinction between the Secretary's *power* under Title VI to cut off student aid and the *desirability* of doing so where other programs could be cut off first. Contrary to Grove City's contention, Pet. Br. at 25, nowhere in this colloquy does Senator Bayh state

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students flowed through to the school. The court found that "although the VA payments are not earmarked for school-related expenditures, *e.g.*, tuition, all that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the approved school." *Bob Jones Univ.*, 396 F. Supp. at 603 n.22.

[16] *Accord, Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549, 555 (5th Cir. 1983); *Hillsdale College v. HEW*, 696 F.2d 418, 430 (6th Cir. 1982), *petition for cert. pending*, No. 82-1538 (Mar. 16, 1983).

that student aid is not "Federal financial assistance". Indeed, Senator Bayh's position on this issue is exactly the opposite, as this Court recognized in *North Haven*, 456 U.S. at 524, 525, where the Court quoted Senator Bayh explaining that "[t]he amendment would cover such crucial aspects as admissions procedures, *scholarships* . . ." (118 Cong. Rec. 5803 (1972) (emphasis added)), and that "the portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment . . . *scholarship aid* . . . ." (118 Cong. Rec. 5807 (1972) (emphasis added)).[17]

C. *The Post-Enactment History.* This Court has twice recognized that the post-enactment history of Title IX is of particular probative value in confirming the intent of Congress with respect to this statute.[18] The subsequent Congressional review of the administrative regulations explicitly confirms Congress' intent that Title IX prohibit discrimination by schools receiving direct or indirect federal funds.

Exercising its authority under Section 902 to promulgate regulations governing Title IX,[19] HEW issued pro-

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[17] Petitioner's reliance on Senator Bayh's 1975 appearance as a witness before the House Subcommittee on Postsecondary Education about the effect of his 1971 amendment is likewise misplaced. *See* Pet. Br. at 25. When asked a technical question about legislation of four years past, Senator Bayh replied "You know, I just don't know. I would have to look that up. . . ." Pet. Br. at 25. This response has *no* probative value whatsoever as to legislative intent four years earlier.

[18] *North Haven*, 456 U.S. at 530-35; *Cannon*, 441 U.S. at 702-03; *see Bob Jones Univ.*, 103 S. Ct. at 2033; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 103 S. Ct. 1713, 1730 (1983).

[19] "A reviewing court may not set aside the Secretary's regulations 'simply because it would have interpreted the statute in a different manner'" (*Herweg v. Ray*, 455 U.S. 265, 277 (1982), quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977)), and, instead, is limited to determining whether the regulations exceed

posed regulations in 1974[20] and, after congressional review,[21] final regulations in 1975[22] governing the operation of federally-funded education programs.[23] HEW construed the phrase "Federal financial assistance" found in Section 901(a) to include educational grants paid to students as well as grant funds paid directly to the school itself. 34 C.F.R. §§ 106.2(g)(1)(ii) & .2(h) (1981) (current version).[24]

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the agency's statutory authority and whether they are arbitrary and capricious. *Heckler v. Campbell*, 103 S. Ct. 1952, 1957 (1983); *Herweg*, 455 U.S. at 275; *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981).

[20] 39 Fed. Reg. 22,228 (1974).

[21] *See* General Education Provisions Act, § 431(d)(1), Pub. L. No. 93-380, 88 Stat. 484, 567, as amended, 20 U.S.C. § 1232(d)(1); *North Haven*, 456 U.S. at 531-32.

[22] 40 Fed. Reg. 24,128 (1975) (codified at 45 C.F.R. part 86 (1977)). These regulations were recodified on May 9, 1980, in conjunction with the establishment of the Department of Education.

[23] These regulations have since been adopted by DE. 45 Fed. Reg. 30,802 (1980) (codified at 34 C.F.R. part 106 (1980)). At the time Petitioners filed their complaint, HEW was responsible for the administration of Title IX regulations relating to the federal programs involved here. HEW's Title IX functions were transferred to DE by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 677-78. We refer separately to HEW and DE.

[24] 34 C.F.R. § 106.2(g)(1)(ii) defines "Federal financial assistance" to include

> [a] grant or loan of Federal financial assistance, including funds made available for . . . . [s]cholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, *or extended directly to such students for payment to that entity.*

(Emphasis added). Section 106.2(h) further defines "Recipient" to mean

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity,

During the congressional review of HEW's proposed Title IX regulations, HEW Secretary Weinberger explicitly testified that HEW interpreted "Federal financial assistance" in Section 901(a) to mean "assistance that the Government furnishes, that goes *directly or indirectly*, to an institution is Government aid within the meaning of Title IX."[25] Both the Senate and House thereafter considered a variety of resolutions disapproving the HEW regulations, but none was passed, although Congress did enact other amendments. *North Haven*, 456 U.S. at 532-33 & nn. 22-24. Indeed, an amendment[26] that would have redefined "Federal financial assistance" as "assistance received by the institution directly from the federal government," introduced on August 27, 1976 by Senator McClure, was rejected by a vote of 30-50. *Id.* Senator Pell explained this rejection as follows:

> [w]hile these tax dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not believe that we should take the position that these Federal funds can be used for further discrimination based on sex."

122 Cong. Rec. 28,145.[27]

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or any person, *to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.*

(Emphasis added).

[25] *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post Secondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. p. 484 (1975) (emphasis added); *see id.* at 481-84.

[26] Amendment No. 390, 94th Cong., 2d Sess., 122 Cong. Rec. 28,144 (1976).

[27] *See also* 122 Cong. Rec. 28,145-46 (1976) (Sen. Bayh) ("[T]he inclusion of students who get Federal assistance is not unique. If we followed this route then the next step is to repeal title VI

HEW's original administrative construction, that Title IX encompasses indirect receipt of federal aid, has continued to the present and this Court should, in accordance with its practice, give "great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." *North Haven*, 456 U.S. at 522 n.12.[28] This long-standing administrative interpretation is particularly entitled to deference where, as here, it was brought to the attention of Congress, which acquiesced in that interpretation after lengthy floor debate. *North Haven*, 456 U.S. at 535. Thus, Congress' consistent rejection of the interpretation urged by Grove City, coupled with Congress' contemporaneous amendment of other portions of Title IX (*see North Haven*, 456 U.S. at 534 & n.25), manifests "a decade of acceptance" (*Bob Jones University*, 103 S. Ct. at 2036 (1983) (Powell, J., concurring)) of an unbroken administrative construction that a school's receipt of benefits from a federally-funded program carries the concomitant requirement that the school comply with the national policy against sex discrimination.[29]

. . . because the court has held in other civil rights matters that if a student gets assistance from the Federal Government the university itself is assisted. . . . The House Committee studied this interpretation. I emphasized at that time that title IX . . . is parallel in its language and enforcement expectations with title VI . . . . The courts have held that title VI . . . does apply if a student receives Federal aid. *If a student is benefited, the school is benefited. It is not new law; it is traditional*, and I think in this instance it is a pretty fundamental tradition. . . .") (emphasis added).

[28] DE has now changed other regulations that define the statutory term "education program or activity." Because this administrative construction has been so recently changed, it is entitled to little deference. *North Haven*, 456 U.S. at 522-23 n.12.

[29] Congress has the authority to set any condition upon the receipt of federal monies so long as that condition is not itself independently unconstitutional. *E.g., Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937); *cf. Community Television of S. Cal. v. Gottfried*, 103 S. Ct. 885, 893 (1983) (conditions set by federal

II. In The Particular Circumstances of This Case, The Entirety of Grove City College Is Subject to the Nondiscrimination Requirement of Title IX.

Section 901 of Title IX prohibits sex discrimination "under any education program or activity" that receives federal financial assistance. 20 U.S.C. § 1681. In *North Haven*, the Court made clear that the question whether the alleged discrimination took place "in an education program that received federal assistance" was a fact issue that turns on the particulars of a given institution's use of federal or other funds. *North Haven*, 456 U.S. at 540. For that reason, the Court thought North Haven's use of federal funds to pay salaries was pertinent, but that the question must be decided in the first instance by the district court on a more developed factual record. *Id.*

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funding agencies). And this Court has repeatedly held that Congress and federal agencies may, under the Spending Clause (U.S. Const. art. I, § 8, cl. 1), require recipients of federal funds to observe stricter standards of nondiscrimination than the Constitution itself requires. *E.g., Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J., announcing the judgment of the Court); *Board of Educ. v. Harris*, 444 U.S. 130, 137-38 (1979); *Lau v. Nichols*, 414 U.S. 563, 569 (1974). Since Grove City is free to terminate its participation in the Basic Educational Opportunity Grant ("BEOG") program, and thereby avoid the requirements of Section 901(a), and since its students are free to attend the College, albeit without federal financial aid, there is no constitutional violation by requiring the College to comply with the nondiscrimination requirements of Section 901(a) as a condition for its continued participation in this program. *Bob Jones Univ.*, 103 S. Ct. at 2034-35; *North Carolina ex rel. Morrow v. Califano*, 435 U.S. 962 (1978), *aff'g*, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977); *Norwood v. Harrison*, 413 U.S. 455, 461-63 (1973); *see also Runyon v. McCrary*, 427 U.S. 160 (1976).

Furthermore, as the Court of Appeals held (Pet. App. A-38 to A-39), *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), is a complete answer to petitioners' argument that DE could not terminate the school's status as a qualified educational institution without first affording a hearing on that issue to students receiving federal financial aid.

This practical approach gives meaning to the statutory terms "program or activity" consistent with the statutory purpose of preventing the use of federal funds to finance discrimination. *See Cannon*, 441 U.S. at 704. Where the factual inquiry in a particular case shows that a university used federal funds in a program or activity that discriminated, or allocated federal dollars to programs that did not discriminate and thereby freed privately obtained funds for programs that do, the court would be in a position to find that the challenged programs received the benefit of federal funds and were therefore subject to Title IX's anti-discrimination requirement.[30]

This practical construction was employed by the Court of Appeals in this case when it concluded that the coverage of Title IX "is as extensive as the program benefited by the federal funds involved." Pet. App. A-31. The Court of Appeals rightly applied that test in holding that, because

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[30] The legislative history of Title VI, which is the model for the Title IX "program or activity" language, reflects the particular attention given by Congress to *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) (*en banc*), *cert. denied*, 376 U.S. 938 (1964). That case held that Cone Memorial Hospital's refusal to provide medical care to blacks constituted a denial of equal protection. The hospital's receipt of federal financial assistance under the Hill-Burton Act constituted sufficient "state action" to subject the institution to constitutional strictures. The *Simkins* holding applied to the entire institution tainted by the illegal discrimination, although it used its federal construction loans exclusively for the purpose of building two additions and a diagnostic treatment center. *Simkins*, 323 F.2d at 971 (Haynsworth, J., dissenting). Title VI was designed to prohibit the same instances of discrimination as would be reached under *Simkins*, *see, e.g.*, 110 Cong. Rec. 7054 (1964) (comments of Senator Pastore), a result that requires reading "program or activity" in at least some factual circumstances to refer to the entire recipient institution and not merely those particular subunits in which earmarked funds are spent. Whether *Simkins* states the currently prevailing test of "state action" does not bear on Congress' intent in 1964 as to the scope of Title VI. *Cf. North Haven*, 456 U.S. at 529; *Cannon*, 441 U.S. at 710-11.

the federal funds involved here benefit the entire college, the "program" here must be defined as the entire institution of Grove City College. *Id.* Grove City itself recognizes that if indirect grants through its students constitute "federal financial assistance," the application of Title IX in this case has "institutional scope." Pet. Br. at 11. Grove City's argument that this conclusion was rejected by the Court in *North Haven* is erroneous. In *North Haven*, the Court properly recognized that application of the terms "program or activity" is a factual question, and did not foreclose the possibility that, in some cases, the facts would require the conclusion that the institution was the "program or activity." 456 U.S. at 539-40 & n.31.[31]

Here, Grove City College receives general, unearmarked assistance in the form of federal grants to its students. These federal funds are received as tuition and go into the general coffers of the college. The institution as a whole draws from these funds, and Grove City does not contend otherwise. In these circumstances, no further factual inquiry is necessary and the only reasonable conclusion is that the entire institution is the "program or activity" subject to Title IX.[32]

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[31] Grove City seeks to draw support from the statutory definition of "educational institution" in 20 U.S.C. § 1681(c). Pet. Br. at 19. But that term is used only in a different portion of the statute and in a context not at issue here: exemptions from coverage. Thus, one cannot conclude that "program" was intended to have a contrasting meaning. On the contrary, the definition of exemptions in terms of entire institutions suggests that such institutions would otherwise be covered under § 901, and encompassed within the term "program" as used therein.

[32] Thus, this Court need not decide here whether "program" as used in § 901 always refers to the institution. This case does not present the factual situation of a targeted federal grant, such as a research grant to a specific biology laboratory within a university. Nor does this case present questions of the scope of coverage in instances such as a federal grant to only one campus of a multi-campus state university, or aid at the public elementary and sec-

Even if one assumed that federal aid specifically earmarked for a certain institutional subunit would make Title IX applicable only to that unit, the statutory language nonetheless compels the conclusion that the entire institution is covered when unearmarked general operating assistance is involved. In that case, the assistance flows to the institution as a whole. Since the "educational program" receiving assistance is the college as a whole, that is the entity required to refrain from discrimination under Title IX.[33] Indeed, *amici* are unaware of any theory advanced by Grove City College, or which could be so advanced, to support a construction of the term "program or activity" narrower than the entire institution in the context of unearmarked general operating assistance.[34]

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ondary levels where tuition assistance is not a factor and federal aid tends to be categorical. *See* Office of Management and Budget, Executive Office of the President, *1983 Catalog of Federal Domestic Assistance* 783-867.

[33] There is no reason why the term "program or activity" could not encompass a college, as well as more limited programs. But even if one took the view that only subunits could be considered "programs," the entire college would still be covered by Title IX when unearmarked funds are received. Since such funds flow to *all* subdivisions of the institution, all such "programs or activities," narrowly defined, are reached.

Of course, a theory restricting the meaning of "programs" to institutional subdivisions would be highly arbitrary. A complex institution such as a college can be subdivided at many different levels, in an infinite number of ways. There is no reliable way of identifying a particular level that would constitute the appropriate "program" under a narrow theory of that term.

[34] During the period between the enactment of Title VI and Title IX, both courts, *e.g.*, *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967), and commentators, *see, e.g.*, Note, *School Desegregation and the Office of Education Guidelines*, 55 Geo. L.J. 325 (1966), construed Title VI as applying on an institution-wide basis. This Court has recognized that such interpretations of Title VI are highly relevant to the construction of corresponding language in

To adopt other than an institutional approach in a case involving unearmarked funds would also run counter to the statutory language in a second way. Section 901 contains a number of explicit exemptions from coverage. These include several that relate to units that do not receive earmarked federal assistance. For example, social fraternities and sororities are excluded from coverage. 20 U.S.C. § 1681(a)(6). There would be no reason to exclude explicitly such organizations if they were not otherwise within the scope of Title IX. Since the federal government does not provide earmarked aid to such social organizations, it cannot be the case that funds must be specifically allocated to particular subunits if they are to be covered. *Haffer v. Temple University*, 524 F. Supp. 531, 541 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

The post-enactment period offers additional relevant evidence regarding the application of Title IX to unearmarked funds.[35] The coverage of intercollegiate athletics was the subject of vigorous debate in extensive hearings in 1975. *See Hearings on Title IX Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 46, 66, 98, 304 (1975). The fact that this issue was given substantial attention lends it weight in the assessment of congressional intent. *See Bob Jones University*, 103 S. Ct. at 2032-33. Notwithstanding the heated debate, Congress did not disapprove the regulation relating to "program or activity." Furthermore, numerous attempts to amend the statute so as to exempt intercollegiate athletics failed. *See Haffer*, 524 F. Supp. at 534. The fact that there was a serious ques-

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Title IX, since Title IX's drafters intended and assumed that the statute would be "applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696. Moreover, the fact that Congress intended Title IX to incorporate the approach to "program or activity" implied in the *Bossier Parish* decision, has been confirmed by its sponsor. 121 Cong. Rec. 20,468 (1975) (Sen. Bayh).

[35] *See* pp. 15-18, *supra*.

tion as to the reach of the regulations strongly suggests that Congress understood and intended that the statutory language was broad enough to reach intercollegiate athletics. Otherwise, there would be little point to the debate over the regulations. This understanding was explicitly affirmed by the sponsor of Title IX, who testified in the hearings.[36] The fact that athletic programs were thought to be within the scope of Title IX, notwithstanding the fact that they do not receive earmarked federal aid, demonstrates the error of the theory that only subunits receiving specific grants are covered.[37]

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[36] Those [who object to regulations applying Title IX to athletics] argue that (1) the scope of Title IX is narrow and defined only to include those education programs that received direct federal financial assistance, and (2) since athletics is not an educational program in direct receipt of federal aid, Title IX cannot and should not apply.

This objection to the coverage of programs which receive indirect benefits from federal support—such as athletics—is directly at odds with the Congressional intent to provide coverage for exactly such types of clear discrimination. For example, although federal money does not go directly to the football programs, federal aid to any of the school system's programs frees other money for use in athletics.

Without federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to federal financial assistance. If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it.

Hearings on Title IX Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 171 (1975) (testimony of Sen. Bayh).

[37] The wording of the funding termination provision of Title IX (§ 902) sheds additional light on the meaning of "program or activity." Congress provided that an agency would terminate funding to a "program, *or part thereof*." 20 U.S.C. § 1682 (emphasis added). The words "*or part thereof*" were not placed in the section prohibiting discrimination. If the words "program or activity" always referred to particular subunits of an institution receiving federal assistance, there would be no need to add the language "or part thereof" in order to provide the option of a limited funding termi-

Acceptance of Grove City's hypothesis that the receipt of federal funds is irrelevant unless those funds are specifically earmarked would lead to anomalous and clearly unintended gaps in the anti-discrimination rule. Under that hypothesis, a narrow grant program earmarking funds for a small part of a college would give rise to Title IX coverage, at least for that part. On the other hand, direct general funding pervading the entire college would leave the entire institution exempt, regardless of the amount of money involved. Congress cannot be presumed to have intended this illogical result if, as is the case, a reasonable alternative is available.

Grove City places great emphasis on its alleged persistent efforts to avoid any involvement with the federal government. Yet the federal assistance it receives is not limited to any narrow part or function of the institution. Rather, Grove City has accepted a subsidy flowing to the institution as a whole. It cannot accept general assistance and yet avoid Title IX coverage. Accordingly, *amici* respectfully submit that, in these circumstances, Grove City College constitutes the "program" subject to Title IX. To conclude that unearmarked assistance flowing to the institution as a whole does not bring that institution under the umbrella of Title IX would run counter to the statutory language and intent, creating an illogical and anomalous exemption that could not have been intended by Congress.

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nation. The addition of that clause indicates that Congress used specific narrowing words when it intended a narrow meaning. The absence of such words in the discrimination prohibition confirms that it should be accorded a broad reach.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should affirm the decision below.

Respectfully submitted,

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No. 82-792

IN THE

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OCTOBER TERM, 1982

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individually and on behalf of its students
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JENIFER S. SMITH; and VICTOR E. VOUGA,

Petitioners,

v.

T.H. BELL, Secretary of U.S. Department of Education;
HARRY M. SINGLETON, Acting Assistant Secretary for
Civil Rights, U.S. Department of Education,

Respondents.

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

ON BEHALF OF

MOUNTAIN STATES LEGAL FOUNDATION

and

AMERICAN ASSOCIATION OF PRESIDENTS
OF INDEPENDENT COLLEGES AND UNIVERSITIES

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INTEREST OF AMICI CURIAE

The amici curiae are membership organizations which represent individuals, colleges and universities, all sharing an interest in promoting the vitality of private education in America by limiting unnecessary federal regulation.

The Mountain States Legal Foundation (MSLF) is a nonprofit, membership, public interest law firm dedicated to bringing before

the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect its members and the public from overly intrusive, unnecessary, and costly governmental regulation.

The American Association of Presidents of Independent Colleges and Universities (AAPICU) is a nonprofit corporation comprised of nearly two hundred (200) presidents of independent institutions of higher learning located throughout the United States. The Association includes members from large universities, such as Pepperdine, Roosevelt, and Brigham Young, and small colleges like Grove City, Hillsdale, and Rockford. AAPICU also includes a diversity of private interests. Some of AAPICU's members preside over church-related institutions, representing such denominations as Baptist, Christian Scientist, Catholic, Methodist, Jewish, Nazarene, and Mormon. The Association also includes members from nonsectarian schools.

AAPICU has frequently been called upon to participate as amicus in important court proceedings impacting upon education, and has expressed its views before congressional committees assigned educational matters. The common bond of all AAPICU members is a belief in the integrity of private education.

INTRODUCTION

This Court must decide whether private educational institutions will be smothered by mechanisms of federal control. A decision adverse to Grove City College in this case threatens the independence and academic freedom which are the very soul of private education in America.

Amici, MSLF and AAPICU, are unquestionably supportive of equal opportunity in higher education. They believe, however, that the administrative regulations to Title IX not only exceed their statutory limitations, but represent a dangerous and illegal extension of federal control over higher education. It is amici's deepest-held conviction that if America's institutions of higher learning lose

control over admissions, hiring, curriculum, and campus policy, in effect over who attends, who teaches, and what standards are enforced, then truly independent higher education will cease to exist.

STATEMENT OF CASE AND QUESTIONS PRESENTED

This case reaches the Supreme Court with pure questions of law, and undisputed facts. Since Grove City College will offer a complete statement of the facts, Amici will merely highlight those they consider the most salient.

Grove City College is a private Christian college with approximately 2,100 students. Throughout its history the college has refused the benefits of government funding in order to maintain its academic independence. Some of Grove City's students do receive Basic Education Opportunity Grants (BEOGs) and federally insured Guaranteed Student Loans (GSLs) from private commercial banks to defray their educational expenses. In both programs, students receive money *directly* from the federal government or bank. In neither program does Grove City receive or administer the federal funds; in neither program is money channeled through the college. All parties concede that Grove City College in no way discriminates on the basis of sex in any of its programs or activities. The college protests the government's control of its programs as a matter of conscience, not as a cover-up for discrimination.

The issue addressed in this brief is whether Title IX authorizes the United States Department of Education (the Department) to regulate an entire private academic institution solely because some students receive federal grants and loans.

In order to protect the integrity of private education in America the answer must be "no."

SUMMARY OF ARGUMENT

The purpose of Title IX is to assure that federal funds are not used to support educational programs and activities that discriminate on the basis of sex. This laudable goal is not, however, served by the Department's regulations. Contrary to the intent of Congress, these regulations instead subject the whole of an academic institution to federal control solely because its students receive federal education grants and insured loans.

The regulations ignore the express limitations of the statute by defining "recipient" to include an entire educational institution. And this, even when neither it nor any of its programs receive any direct federal assistance! Application of this 'institutional' approach has resulted in contradictory and absurd results:

First, by the Department's regulations, the more indirect the federal aid and the more remote its benefits, the more pervasively a private college will be regulated.

Second, the Department has manufactured a fictionalized relationship between the government and Grove City College to justify its sweeping regulation of the college.

Third, the characterization of an entire academic institution as a "program" renders the 'program-specific' limitation of Title IX meaningless.

And finally, designation of Grove City College as a "recipient" subject to federal control hurts the very individuals Title IX is intended to help — the students.

Any benefit Grove City College derives from the federal government is remote, any aid indirect, and any value de minimus. To subject an entire academic institution to federal regulation on this sole basis defeats the purpose of Title IX and threatens the academic freedom which is essential in any truly free society.

ARGUMENT

TITLE IX APPLIES ONLY TO THOSE EDUCATIONAL PROGRAMS AND ACTIVITIES THAT RECEIVE DIRECT FEDERAL FINANCIAL ASSISTANCE.

Grove City College has neither sought nor received federal financial assistance. Despite efforts to maintain its autonomy, the college must now seek to cast off the federal regulation it and others like it have so scrupulously avoided. Solely because it enrolls students who themselves participate in BEOG and GSL programs, the Department maintains that the college is a "recipient" of federal financial assistance, and thus subject to the entire panoply of federal regulation.[1]

Title IX was enacted to assure that federal funds would not be used to support educational programs or activities that discriminated on the basis of sex. The statute provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance*...

20 U.S.C. § 1681 (1976) (emphasis added). The italicized language demonstrates that Congress clearly intended Title IX to apply only to those *education programs and activities* that receive federal financial assistance. Only if a specific program or activity receives government aid is it subject to Title IX regulations. The question thus becomes whether the *program or activity* is a recipient of federal aid for purposes of Title IX analysis.

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[1] These regulations specify available courses, manner of student housing, provision of health services, and student participation in extracurricular activities. *See* 45 C.F.R. §§ 86.34; 86.32; 86.39; 86.31(a); and 86.41. They also control student curfew hours, pareitals, and such matters as the consequences of student marriages, pregnancies, and abortions. *See* 45 C.F.R. §§ 86.31(b)(4); 86.21(c); and 86.40.

This reading of the statute is obvious and self-evident from the plain language of § 1681. Confusion and contradiction have nevertheless persisted over the proper application of Title IX to private educational institutions. The source of this contradiction lies not in the statute, but rather in the Department's regulations.

The regulations to Title IX, 45 C.F.R. §§ 86.2(g)(1)(ii) and (h) (1982) state:

> (g) "Federal financial assistance" means any of the following, when authorized or extended under a law administered by the Department:
>
> (1) A grant or loan of Federal financial assistance, including funds made available for:
>
> . . . .
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
>
> (h) "Recipient" means *any* State or political subdivision thereof, any public or private agency, *institution*, or organization, or other entity, or any person, *to whom Federal financial assistance is extended* directly or through another recipient *and which operates an education program or activity which receives or benefits from such assistance*, including any subunit, successor, assignee, or transferee thereof (emphasis added).

These regulations have transformed the 'program-specific' intent of § 1681 into an 'institutional' definition of recipient.

The Department defines "recipient" on the basis of any direct or indirect aid or benefit. Contrary to Title IX it does not require that there be an identifiable program or activity. Thus if the federal government insures a student's educational loan and that student in turn enrolls in a college and uses the loan proceeds to pay tuition, the

entire institution is subject to Title IX regulation. The underlying problem clearly rests with the Department's definition of "recipient."

In drafting these regulations the Department has relied on a Senate version of Title IX which was ultimately rejected by Congress. The proposed statute was 'institutional' in nature and provided that:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity conducted by a public *institution* ... *which is a recipient of Federal financial assistance* for any education program or activity ...

117 Cong. Rec. 30156 (1971) (emphasis added). This version determined applicability of Title IX on the basis of whether the *institution* itself was a recipient of federal assistance. Like the current regulations, this defeated Senate version would have the government first determine whether the institution was a recipient of federal aid, and if so, subject all of its programs and activities to federal control.

Congress chose instead to adopt the present 'program-specific' version of Title IX. The statute as enacted requires one to *first* identify an educational program or activity receiving federal financial assistance. This *specific program* is then subject to the regulations and enforcement of the statute. The institution as a whole is simply not under consideration.

The Department has persisted in its overbroad 'institutional' approach despite Congress' rejection of the Senate version. If a private educational insitution has only one student enrolled who receives any type of federal financial aid, even a federally insured GSL from a private bank, the institution as a whole is deemed a "recipient" just the same as a school which receives millions of dollars of direct aid. This recharacterization of the programmatic statutory language chosen by Congress has resulted in contradictory and absurd results:

A. *Regulation Of Private Education Ironically Becomes More Pervasive as Federal Aid Declines.*

The more indirect and remote the benefits of federal aid, the more pervasively a private college will be regulated. This irony is easily demonstrated by comparing the case at bar with a similar case now pending before this Court, *Hillsdale College v. Department of Health, Education & Welfare*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. filed* (U.S. Mar. 16, 1983) (No. 82-1538). Like Grove City College, Hillsdale College is a small private institution which has refused direct federal financial assistance. Its students, however, do receive grants and insured loans from the federal government. Unlike Grove City College, these funds do not go directly to students but *rather* are given to the college, which in turn selects on the basis of need those students who will receive assistance.

As Hillsdale has administrative and discretionary authority to select beneficiaries of federal educational assistance, the Sixth Circuit held that its federal grant and loan program was a "recipient" within the meaning of § 1681. The court stressed that the limited application of Title IX necessarily restricted the Department's enforcement authority to only those specific programs actually receiving federal funds. The federal loan and grant program, and that program alone, was thus subject to Department regulation. *Id.* at 429-30.

By contrast, the students at Grove City College receive their assistance directly from the federal government. The college has no administrative or discretionary role whatsoever concerning those funds. Even though Grove City College has less administrative involvement than Hillsdale College *all* of its programs are regulated while only Hillsdale College's federal student aid program is regulated. In allowing this anomaly to occur, the Third Circuit has ignored the 'program-specific' mandate of the statute.[2]

---

[2] This Court recently acknowledged the 'program-specific' nature of Title IX in *North Haven Board of Education v. Bell*, 456 U.S. 512, 535-39 (1982).

A proper application of the statute avoids this disparity. By looking first to the program receiving federal aid, it is clear that at Hillsdale College the student aid office receives, in hand, monies from the federal government and is charged with discretionary authority in administering those funds. As a recipient, that specific program is prohibited from discriminating on the basis of sex in its administration of those federal funds. Logically following from that application of the statute, Grove City College has no program or activity that receives federal funds and therefore neither the college nor any of its programs are subject to Title IX regulation. Only by manufacturing a fictionalized relationship between the government and the college has the Department been able to justify its sweeping regulations.

B. *The Department Has Manufactured A Fictionalized Relationship Between The Government And The College To Justify Its Sweeping Regulations.*

As this Court found in *Walz v. Tax Commission*, 397 U.S. 664 (1970), some forms of benefit derived from the federal government by private institutions are so minimal and remote as to essentially fail to create a nexus between the two entities. *Id.* at 675-76. That is the case here. The money received by Grove City by way of student tuition payments from federal grants and insured loans has not created any relationship between the college and the federal government. The money goes to the student and it is his choice at which institution to use his loan or grant.[8] The relationship vis-a-vis that money is thus between the school and the student: BEOGs and GSLs award federal aid to a student not the college.

By the attenuated logic of the Department "the corner grocer and the A&P are 'recipient institutions' because some of their customers receive social security checks. The New York Times and the Chicago Tribune are federal contractors because welfare recipients

[8] 20 U.S.C. § 1078(a)(8)(A) (1976); 34 C.F.R. § 690.94 (1982).

buy papers."[4] Similarly a college is a recipient of federal financial assistance if it enrolls students who receive food stamps, V.A. benefits, child welfare payments or military severence pay.

In Grove City College, the student, like the grocery shopper, is the actual recipient of the federal aid, and not the private institution. It is the student who contracts with the federal government to receive assistance and it is the federal government that decides who shall receive the funds and in what amounts. The college is not even privy to this information. Its only role is to respond to a government inquiry whether the students requesting aid are currently enrolled in the school.[5] Sweeping regulation based on a fictionalized relationship between the college and the government is irreconcilable with the 'program-specific' limitation on the Department's regulatory and enforcement power under Title IX.

C. *Characterization Of An Entire Academic Institution As A "Program" Renders The 'Program-Specific' Limitation Of Title IX Meaningless.*

The Department justifies regulation of an entire institution by application of the 'benefit theory.' Under this theory every dollar of federal money that goes into a program frees up funds for use by other educational programs and activities throughout the rest of the college. Therefore, reasons the Department, the entire institution is 'benefiting' from that money and the entire institution is subject to federal regulation.

It is not disputed that Grove City College, and other similarly situated educational institutions, do receive some benefit by having students enrolled who receive federal grants and insured loans. However, the question before the Court is not whether the school derives benefit, but rather, how much benefit must be derived before

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[4] Statement by Dr. Milton Friedman, *Newsweek*, Dec. 29, 1975 at 47.

[5] *Grove City College v. Harris*, 500 F. Supp. 253, 259 (W.D. Pa 1980) (Amended Findings of Fact ¶¶17, 18, 20, 21), *aff'd*, *Grove City College v. Bell*, 687 F. 2d 684, 689 (3rd Cir. 1982).

a school will be considered a "recipient" subject to Title IX regulation of its entire admissions, faculty, curriculum and campus programs. To designate an entire institution a "program" when the benefit it derives is remote, the aid indirect and the value de miniums defeats the purpose and the intent of the congressional legislation.

Numerous courts have recognized that application of the 'benefit theory' renders the entire 'program-specific' limitation of Title IX meaningless.[6] Under the Department's theory, every college program and activity would be subject to regulation the minute one dollar of federal aid entered the general fund by way of student tuition payments. The result of this unwarranted extention of Departmental authority unfortunately serves nothing more than to punish innocent students.

D. *Designation Of Grove City College As A "Recipient" Subject To Federal Control Hurts The Very Individuals Title IX Is Intended To Help — The Students.*

The Department has intentionally extended federal control over private institutions on the sole basis of student receipt of federal grants and insured loans. Any institution resisting this ultra vires extention of federal control finds its students stripped of their BEOGs and GSLs. The government is forcing private colleges and their students to make unfortunate choices. An institution must either submit to pervasive federal regulation of its admissions, curriculum and campus policies or exclude those students who receive federal educational benefits in order to maintain its academic autonomy. Similarly the student must choose whether to sacrifice federal scholarships and loans in order to attend the college or university of his choice or to forego that freedom and enroll in an institution which is already highly regulated. By placing private colleges and

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[6] *Hillsdale College v. Department of Health, Education & Welfare*, 696 F.2d at 430; *Rice v. President and Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *University of Richmond V. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Bennett v. West Texas State University*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981), *rev'd without opinion*, 698 F.2d 1215 (5th Cir. 1983), *appeal filed* (U.S. April 6, 1983) (No. 82-1683).

their students in this position, the Department is defeating any purpose of free academic choice Congress may have had in passing equal education opportunity legislation.

CONCLUSION

Conflict between the government and private education is not new to this Court. Others have come to defend our noble tradition of academic freedom. Perhaps the most eloquent was Daniel Webster in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). *Dartmouth College* was a property case, although not one concerned with tangible property. The college property that Daniel Webster sought to secure from governmental encroachment was intangible — its reins of power. Its commonality with the *Grove City College* case is obvious in the question it asks: shall the government wield control over our country's private educational institutions? Mr. Webster thought not, as he directed his closing argument to Chief Justice John Marshall:

> This, sir, is my case! It is the case not merely of that humble institution, it is the case of every college in our land! It is more! It is the case of every eleemonsynary institution throughout our country — of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life! It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped, for the question is simply this, "Shall our state legislatures be allowed to take *that which is not their own*, to turn it from its original use, and apply it so such ends and purposes as they in their discretion shall see fit!"
>
> Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But if you do so, you must carry through your work! You must extinguish,

one after another, all these great lights of science which for more than a century have thrown their radiance over our land![7]

And Chief Justice Marshall replied:

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to goverment, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society. . .

Trustees of Dartmouth College v. Woodward, 17 U.S. at 634.

The decades of sacrifice made by these private institutions to avoid federal control will be rendered meaningless if the Department is permitted to usurp control over the academic freedom of our independent colleges and universities.

Respectfully submitted,

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[7] Recorded in letter from Chauncy A. Goodrich to Rufus Choate (Nov. 25, 1852, *Dartmouth College*) (reporting on *Dartmouth College* oral argument) (cited in L. Baker, *John Marshall* 661-62 (1970)).

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No. 82-792

In the Supreme Court

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v.

T. H. BELL, Secretary of the United States Department of Education, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, GROVE CITY COLLEGE, et al.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees (Board) composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where it believes the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of this brief on behalf of PLF and its members.

Due to its public interest perspective, PLF believes that it can provide this Court with a more complete argument on the question whether the Department of Education may terminate direct grants to students without any finding of discrimination on the part of a college.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Third Circuit, is reported at 687 F.2d 648 (3d Cir. 1982). The opinion of the United States District Court, Western District of Pennsylvania, is reported at 500 F. Supp. 253 (W.D. Pa. 1980).

STATEMENT OF THE CASE

Grove City College (Grove) is a private coeducational institution located in Grove City, Pennsylvania. Of its approximately 2,200 students, 140 are eligible to receive federal Basic Educational Opportunity Grants (BEOG) and 342 have obtained Guaranteed Student Loans (GSL). Grove itself receives no federal or state financial assistance; the BEOGs and GSLs are paid or loaned directly to the students. Grove's only role is in the case of BEOGs, a certification regarding the student's costs and enrollment status.

In July, 1976, coincidental with this nation's bicentennial, the Department of Education's (Department) predecessor, Department of Health, Education and Welfare, began efforts to require Grove to execute a so-called Assurance of Compliance based on receipt of BEOGs and GSLs by Grove students, certifying compliance with Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, *et seq.*). Title IX prohibits gender-based exclusion from participation in any education program or activity receiving federal financial assistance. Grove refused to execute the Assurance of Compliance on the ground that it received no federal financial assistance.

After an administrative hearing the Department concluded that although there was no indication of sex discrimination by Grove, Grove was a recipient of federal financial assistance. The Department therefore prohibited the payment of BEOGs or GSLs to students attending Grove.

Grove, joined by four student recipients of BEOGs and GSLs, filed suit in District Court. The District Court granted summary judgment to Grove on the basis, *inter alia*, that the Department could not bar Grove students from BEOG and GSL participation unless it found that Grove was engaged in discrimination prohibited by Title IX. The Court of Appeals reversed. This Court granted certiorari on February 22, 1983.

SUMMARY OF ARGUMENT

A finding of discrimination on the basis of sex is a prerequisite to the imposition of Title IX's funding sanctions. The Department's sanctions here penalize rather

than protect the students who are the intended beneficiaries of Title IX. The Department may not, consistent with Title IX and due process, hold students hostage merely to vindicate its bureaucratic authority where there is no indication of any discrimination on the part of the college.

ARGUMENT

TITLE IX REQUIRES A FINDING OF DISCRIMINATION BEFORE FUNDING SANCTIONS MAY BE IMPOSED

Amicus curiae, PLF, directs its argument only to the question whether the Department may prohibit Grove students from participating in the BEOG and GSL programs when there is no indication that Grove has engaged in discrimination. Title IX provides: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a). PLF believes that the Department has so misconstrued Title IX that it is the Department, not Grove, which is excluding persons from participation in educational activities.

After the compliance hearing, the administrative law judge ruled "'[t]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief.'" *Grove City College v. Harris*, 500 F. Supp. 253, 255 (W.D. Pa. 1980). The District Court similarly found no evidence or even allegation of sex discrimination. *Id.* at 268. The

sole reason the Department is sanctioning Grove students is Grove's refusal to submit to the Assurance of Compliance form. In fact, what is at issue is the glorification of the Department's Assurance of Compliance form over the substance of sex discrimination.

The District Court put it lucidly:

> "It is the firm belief of this Court that termination of the BEOG student aid payments and/or the GSL payments is not the proper remedy for coercing the College into filing an Assurance of Compliance where there is no allegation or evidence of sex discrimination and where the students who are receiving BEOG and GSL benefits will be punished needlessly for no good purposes." *Id.*

The District Court noted the student plaintiffs' affidavits stated that they cannot continue attending the college of their choice if their BEOG and/or GSL funds are terminated. *Id.* at 270. That court further noted the important government interests advanced by encouraging our youth to improve their productivity and the importance to the future of our nation to bring within the reach of our less economically favored youth, the educational opportunities available to the well-to-do. *Id.* Instead of exercising this stewardship of the public trust, the Department seems determined not to help students through school, but to force them out of it.

The District Court correctly saw that the BEOG and GSL programs and Title IX legislation were all three specifically designed to protect and advance the rights of students. But termination of a student's grant or loan without any finding of discrimination on the part of the college unfairly punishes the innocent student without his

or her receiving any concomitant benefit. Certainly Congress never intended this absurd result. *Id.*

This Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979), that Congress drafted Title IX with an unmistakable focus on the benefited class rather than simply a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. The Department with its emphasis on forms for forms' sake has lost sight of this human element.

By contrast, this Court in *Cannon* noted that termination of federal financial support is a severe remedy and often may not provide an appropriate means of protecting individuals against discrimination. *Id.* at 704. Certainly stripping students of the ability to attend the school of their choice seems an utterly inappropriate means of "protecting" them from a discrimination which has never even been alleged.

Cannon analogizes Title IX to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and quotes Senator Humphrey's explanation:

> "'[Title VI] encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education. . . . Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination.'" *Id.* at 721-22.

Apparently the Department has not heeded this Court's cautionary statements as to such rash and unnecessary

actions. Neither has it heeded the "Congressional purpose to avoid a punitive as opposed to a therapeutic application of the termination power." *Board of Public Instruction of Taylor County, Florida v. Finch,* 414 F.2d 1068, 1075 (5th Cir. 1969). There, the Fifth Circuit noted the importance that the antidiscrimination acts be "shielded from a vindictive application." *Id.* at 1078. Unfortunately, the perception left by the Department's conduct in this case is not one of protecting students but of vindicating its bureaucratic authority.

In order to prevent this abuse of authority the Fifth Circuit required that "the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." *Id.* at 1079.

This requirement of a factual finding of discrimination was rejected by the Court of Appeals in this case. *Grove City College v. Bell,* 687 F.2d 684, 703 (3d Cir. 1982). The court relied on *Gardner v. State of Alabama,* 385 F.2d 804 (5th Cir. 1967). *Bell,* 687 F.2d at 703. In *Gardner,* however, the State of Alabama admittedly provided benefits to blacks and whites in a different manner, solely on the basis of their race. *Gardner,* 385 F.2d at 816-17. Thus while an Assurance of Compliance would be appropriate in *Gardner* to end admitted discrimination, the case is not relevant to the present situation where there is no evidence of discrimination.

The Court of Appeals also relied on language in *United States v. El Camino Community College District,* 600 F.2d

1258, 1260 (9th Cir. 1979), to the effect that the Department in exercising its investigatory powers "'must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance,'" *quoted in Bell,* 687 F.2d at 703. The point missed by the court is that the Department's scrutiny of Grove's policies and practices led to a finding by its administrative law judge that there "was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX." *Grove City College v. Harris,* 500 F. Supp. at 255.

Given the extreme prejudice to the affected students, the intended beneficiaries of Title IX, of the Department's termination of their grants and loans, the fundamentals of due process require a finding of discrimination before imposition of such sanctions. The Court of Appeals, relying on *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980), found no due process issue. *Bell,* 687 F.2d at 704. The court, however, overlooked the critical fact that the nursing home in *O'Bannon* had been surveyed by the cognizant agency and had been found deficient in seven of eighteen requirements. *O'Bannon,* 447 U.S. at 776 n.3. Here the Department's hearing found no violations or deficiencies involving discrimination. To strip Grove students of their ability to attend the school of their choice absent such finding is a violation of their due process rights. *Grove City College v. Harris,* 500 F. Supp. at 269-70.

In *North Haven Board of Education v. Bell,* ..... U.S. ....., 72 L. Ed. 2d 299, 319 (1982), this Court cited the

Department's recognition that Title IX "limited its authority to terminate funds to particular programs that were found to have violated Title IX . . . ." Absent such a finding the Department should not be permitted to renege on the promise made by Title IX to the nation's students.

CONCLUSION

The Department's actions in cutting off grants and loans to Grove students without any evidence of discrimination on Grove's part violate both Title IX and due process. Instead of seeking to protect students from discrimination, the Department's actions are calculated merely to demonstrate its authority over nonpublicly funded schools. Such arrogance of power has no place in our federal system. Amicus, PLF, therefore urges that the decision of the Court of Appeal be reversed.

Dated: April 6, 1983.

Respectfully submitted,

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TERREL H. BELL, ET AL.

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Brief of the Honorable Claudine C. Schneider, Gary Ackerman, Michael A. Andrews, Anthony C. Beilenson, William S. Broomfield, Sala Burton, Rod Chandler, Barber B. Conable, Jr., Alan Cranston, George W. Crockett Jr., Norman E. D'Amours, Robert W. Davis, Bob Dole, Byron L. Dorgan, Don Edwards, Cooper Evans, Lane Evans, Walter E. Fauntroy, Vic Fazio, Geraldine A. Ferraro, Barney Frank, Dan Glickman, William H. Gray III, Bill Green, James M. Jeffords, Nancy L. Johnson, Marcy Kaptur, Barbara B. Kennelly, William Lehman, Mickey Leland, Mel Levine, John R. McKernan, Jr., Stewart B. McKinney, Buddy MacKay, Lynn Martin, Barbara A. Mikulski, Norman Y. Mineta, Bruce A. Morrison, Mary Rose Oakar, James R Olin, Bob Packwood, Claude Pepper, Edward R. Roybal, Patricia Schroeder, Paul Simon, Olympia J. Snowe, Estaban Edward Torres, James Weaver, Ted Weiss, Howard Wolpe of the United State Congress, as Amici Curiae.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GROVE CITY COLLEGE, PETITIONER

v.

TERREL H. BELL, ET AL.

Brief of Amici Curiae

INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of current Members of the United States Congress. As Members of Congress, Amici have a compelling interest in the proper construction of statutes, and leave to file is frequently granted congressional Amici, particularly where, as here, legislative history must be examined extensively. E.g., Myers v. United States, 272 U.S. 52 (1926). Because the intent of Congress in

enacting Title IX of the Education Amendments of 1972 was to eliminate sex discrimination from all aspects of American education, Amici submit the following brief in support of the positions taken by respondent in the court below.[1]

The Amici are members of both sexes, both houses of Congress, both political parties and all parts of the political spectrum. A number of the Amici were in the Congress when Title IX was passed. Many Amici are members of the Congressional Caucus for Women's Issues, a bipartisan organization which has an enduring interest in issues specifically affecting women. Others are members of the Congressional Black and Hispanic Caucuses, who are particularly concerned about the implications that the Court's interpretation

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[1] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

of Title IX in this case will have for enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in language that is parallel to the language of Title IX.

All of the Amici are co-sponsors of one of two identical bills, S. 149, 98th Cong., 1st Sess. (1983), and H.Res. 190, 98th Cong., 1st Sess. (1983), which reaffirm the congressional intention that Title IX and the regulations issued pursuant to it

> should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.

H. Res. 190, which is co-sponsored by 225 members of the House of Representatives, was reported favorably to the House by the Education and Labor Committee on August 5, 1983.

STATEMENT

Petitioner is a college which receives no direct federal funding. Grove City College v. Bell, 687 F.2d 684, 689 (3d Cir. 1982). However, one hundred forty of Petitioner's approximately twenty two hundred students are eligible to receive Basic Educational Opportunity Grants (BEOG's) appropriated by Congress and allocated by the Department of Education pursuant to 20 U.S.C. §1070a (1976 and Supp. 1981), and three hundred forty-two students have obtained Guaranteed Student Loans (GSL's). Id. at 388. In July 1976, the Department of Health, Education and Welfare began efforts to obtain an Assurance of Compliance from Petitioner as a means of ensuring its compliance with Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, §§901-907, 86 Stat. 373-75. Petitioner refused to file the Assurance on

the basis that it received no federal financial assistance. 687 F.2d at 689.

In the administrative proceedings brought by the Department to terminate grants and loans to students attending the college, an administrative law judge concluded that Petitioner was a recipient of federal financial assistance. He decided further that BEOG's and GSL's could be terminated because of Petitioner's refusal to execute an Assurance of Compliance pursuant to Title IX. An order prohibiting the payment of BEOG's and GSL's to students attending Petitioner was entered. Id.

Petitioner and four student recipients of BEOG's and GSL's sued the Department to declare void the termination of BEOG and GSL assistance and to enjoin the Department from requiring Petitioner to file an Assurance of Compliance as a condition of preserving its eligibility in the BEOG and GSL programs. The complaint also sought a declaration that

the Title IX regulations promulgated by the Department either exceeded the Department's authority or were unconstitutional as applied to Petitioner. Id.

The district court rejected Petitioner's contention that BEOG's and GSL's do not constitute federal financial assistance to the college within the purview of Title IX. However, it granted much of the relief sought by Petitioner because it concluded that the Department could not terminate BEOG's and GSL's based on Petitioner's refusal to execute an Assurance of Compliance. Id.

The court of appeals reversed with respect to BEOG's.[2] The court held that under Title IX the Department was authorized to construe the phrase "federal financial

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[2]No appeal was taken with respect to the GSL's.

assistance" to include educational grants paid to students. Thus, institutions that received aid only indirectly, that is, through the tuition paid by students, properly were found to be within the purview of Title IX. 34 C.F.R. §§106.2(g)(1)(ii), 106.2(h)(1982). 687 F.2d at 691.

The court began its analysis by stating that the language of section 901(a) "extends Title IX's coverage to

> 'any educational program or activity receiving Federal financial assistance....' Hence, by its all inclusive terminology the statute appears to encompass all forms of federal aid to education, direct or indirect (citation omitted).

Id. Relying on this Court's decision in North Haven Board of Education v. Bell, 456 U.S. 512, 520 (1982), the court rejected the narrow reading of Title IX urged by Petitioner on the ground that a broad reading of the statute is required by its remedial purpose of eliminating sex discrimination from American education. 687

F.2d at 691.

The court pointed out that the legislative history of Title IX reveals that it was patterned after Title VI of the Civil Rights Act of 1964, which proscribes discrimination by reason of race, color, religion, or national origin. The drafters of Title IX intended that Title IX would be interpreted and applied as Title VI had been. Id. Like Title VI, therefore, Title IX prohibits the use of federal money "in any fashion" which would subsidize discrimination on the basis of sex, irrespective of whether the use is direct or indirect. The court stressed that during the floor debates on Title IX, which comprise the most authoritative source of its legislative history, Senators Bayh and McGovern specifically described one purpose of Title IX as prohibiting the use of federal money by institutions receiving aid

under the provisions of S. 659, the bill that established the BEOG program as well as Title IX. Id. at 692.

The court also found support for its conclusion in the post-enactment history of Title IX. The Department's regulations were submitted to Congress for review pursuant to Section 431(d)(1) of the General Education Act, Pub. L. 93-380, 88 Stat. 567 (1974), (codified as amended, 20 U.S.C. §§ 1232[d][1][1976 and Supp. 1981]). During the hearings on the regulations, then HEW Secretary Weinberger specifically advised the House Committee of the Department's interpretation that Title IX coverage extends to indirect recipients of aid. A number of resolutions were introduced to reverse this interpretation specifically as well as to reject the entire set of regulations. None passed. The Department's interpretation was the subject of Congressional debate again in 1976 when

Senator McClure proposed an amendment to Title IX to limit its coverage to institutions receiving aid "directly from the federal government." 122 Cong. Rec. 28,144 (1976). The debate on this resolution made clear that the Department's interpretation of Title IX as requiring comprehensive coverage of recipients of any type of federal funding correctly reflected the intention of Congress in passing Title IX. The McClure amendment was defeated. 687 F.2d at 695.

As its final basis for deciding that Title IX's coverage extends to institutions such as Petitioner, the court pointed to the decision in Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975), in which the University was found subject to Title VI solely on the basis that some of its students received Veterans Administration

educational benefits. In light of the clear congressional intention that Title IX follow in the path of Title VI, this precedent could not be ignored.

Having concluded that the receipt by students of BEOG's rendered the college subject to Title IX, the court next considered the extent of the coverage. It again determined that the broad remedial purposes of Title IX to prevent sex discrimination in education require a comprehensive approach to interpretations of the statute. Accordingly, it concluded that the "program-specific" language of Title IX means that where students receive federal aid, the entire College is benefitted. Therefore, the entire institution constitutes the "program" to which Title IX applies. 687 F.2d at 697-700.

The court noted that to hold otherwise would have the absurd result of subjecting a college that receives earmarked federal

funding for a particular program to a greater degree of federal scrutiny than would be true for a college that receives indirect federal funding which the college is then free to use to the benefit of any part of its program. The court discussed the legislative controversy over whether Title IX applies to the type of athletic program that is typical in American educational institutions, that is, one that receives no earmarked federal funding. Congress defeated numerous attempts to amend Title IX to exclude athletic programs from Title IX coverage, while at the same time amending it to exclude from coverage social fraternities and sororities. The court concluded from this congressional activity that Congress believed that programs not receiving earmarked federal aid were nonetheless covered by Title IX so long as the institution sponsoring them received

some form of federal funding. Otherwise, it would have been futile even to consider whether to exclude from coverage activities such as athletics and social fraternities and sororities which typically receive no earmarked federal funds. Id. at 699-700.

Finally, the court noted that effective enforcement of Title IX would be impossible unless enforcement efforts could be directed against an entire institution which is receiving indirect or non-earmarked aid from the federal government. Id. at 700.

SUMMARY OF ARGUMENT

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving

Federal financial assistance...." Congress intended this language to be applied comprehensively to prohibit gender discrimination in all aspects of the American educational system, to include entire institutions where students receive federally funded tuition assistance.

The broad intention of the Congress was expressed initially in the broad language used in Title IX. During the initial Title IX debates, furthermore, numerous members of Congress manifested their expectation that Title IX would apply to institutions whose students receive BEOG's, a program established by Title I of the bill.

The Title IX regulations promulgated by the Department of Health, Education, and Welfare, interpreting the Act as covering an entire institution where students receive federally-funded tuition assistance, are consistent with the broad Congressional intention. Congress has been made aware

that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., after which Title IX was patterned, has been interpreted consistently with the HEW regulations. The regulations have been subjected to a comprehensive congressional review, both on the floor and in committee hearings. Numerous bills have been introduced with the purpose of overruling the Department's interpretation. None has been enacted.

Resolutions introduced this session in both the Senate and the House of Representatives restate the unaltered Congressional intention that Title IX and its regulations not be "amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system." S. 149, 98th Cong., 1st Sess. (1983); H.Res. 190, 98th Cong., 1st Sess. (1983).

ARGUMENT

Congress Intended That Title IX be Applied Comprehensively to Prevent Sex Discrimination in Education

From the time it first considered Title IX, Congress has viewed the statute as a broad prohibition on sex discrimination in education. The intervening decade has seen no change in the Congressional intention that the statute be interpreted and applied comprehensively to eliminate all gender discrimination from educational institutions that receive federal funding, whether that funding be "direct" or "indirect," to all or some of the recipient's programs. See, e.g., S. 149; H.Res. 190, supra.

When he first introduced the bill in the Senate, Senator Bayh focused on the broad purpose which was to be served by Title IX: the elimination of sex discrimination from American education. He

said:

> [A]s we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other, more subtle but still pernicious forms of discrimination. As we turn our attention to these provisions of the Higher Education Act, let us ensure that no American will be denied access to higher education because of race, color, religion, national origin, or sex. Today, I am submitting an amendment to this bill which will guarantee that women, too, enjoy the educational opportunity every American deserves.

117 Cong. Rec. 30,155 (Aug. 5, 1971).

Representative Edith Green, who chaired the hearings that preceded the introduction of Title IX, emphasized the broad purpose of Title IX in the debate on the bill in the House:

> The purpose of Title [IX] is to end discrimination in all institutions of higher education...across the board....

117 Cong. Rec. 39,256 (Nov. 4, 1971).

This Court consistently has interpreted the language of Title IX in light of the

broad Congressional intent. Thus, in Cannon v. University of Chicago, 441 U.S. 677 (1979), the Court identified the Congressional purposes as follows:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes [Title VI and Title IX].

Id. at 704. In order to serve the second purpose, this Court found that Title IX created a private right of action to remedy sex discrimination in education. Id. at 705-706.

More recently, in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), this Court upheld the Title IX regulations prohibiting federally funded education programs from discriminating against employees on the basis of gender. The Court reiterated that:

> There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language (citations omitted)."

Id. at 521.

The question in this case is whether Congress intended that Title IX be given the comprehensive interpretation necessary to eliminate sex discrimination from educational institutions. The answer clearly is yes, irrespective of whether an institution receives direct or indirect aid to all or some of its programs.

In its decision in the case before this Court, the Third Circuit correctly determined that Congress intended that Title IX apply comprehensively to prevent sex discrimination:

> [W]e believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve....

Grove City, supra, at 697. As the court stressed, the language of Title IX is the

primary evidence of Congress's intent that Title IX apply comprehensively to proscribe sex discrimination in education:

> [B]y its all inclusive terminology the statute appears to encompass all forms of federal aid to education, direct or indirect.

Id. at 691.

The 1971 and 1972 debates on the legislation that ultimately became Title IX are replete with evidence that Congress intended that the words of the statute be given their broadest application. Its intention included coverage of institutions receiving funds both directly and indirectly.

Title IX was part of the Education Amendments of 1972, which also served to establish the Basic Education Opportunity Grant program. Pub. L. 92-318, 86 Stat. 235. In their debates on the bills that were the basis for the Act, S. 659 and H.R. 7248, both proponents and opponents of Title

IX demonstrated their awareness of this connection and their understanding that passage of Title IX would subject institutions whose students received BEOG's to the coverage of Title IX. Senator McGovern stated the connection quite specifically:

> I urge the passage of [Senator Bayh's] amendment to assure that no funds from S. 659, the Omnibus Education Amendments Act of 1971, be extended to any institution that practices biased admissions or educational practices.

117 Cong. Rec. 30,158-159 (1971). Senator Bayh argued that only the passage of Title IX could ensure that the "hundreds of millions of dollars" of educational expenditures authorized by the remainder of the bill would be applied equitably to all citizens, whether male or female. 117 Cong. Rec 30,412 (1971).

In the House, opponents of Title IX argued that the increases in aid to higher

education included in the bill should not be accompanied by an increase the federal control that would accompany Title IX. Representative Cleveland pointed out, for example:

> It is worthy of note that this provision which meddles in the internal operation of our colleges and universities comes in the same bill that is providing billions of dollars for the higher educational institutions. I cannot help but remember some years ago when we were debating whether to establish Federal programs to aid education, a major concern of many of us was whether the Federal aid would be accompanied by Federal interference. Today the chickens are coming home to roost.

117 Cong. Rec. 39,255 (1971).

Representative Steiger stated his reluctance to vote for a bill that provided student aid while tying it to federal control:

> [U]nder the bill, under the titles which we have gone over before, we have in effect allowed the local financial assistance officers to have a rather broad sweep of powers in their right to pick and choose those who should receive aid which could work against low-income students, but in this one we

> now are going to say that it is the Federal policy that you cannot discriminate because of sex. This dichotomy confuses me on one hand we grant latitude and autonomy while on the other limiting autonomy.

117 Cong. Rec. 39,257 (1971).

Thus it was clear to the members of Congress voting on Title IX that one program that would be affected by the new prohibition on gender discrimination was the Basic Education Opportunity Grant program being established by the same Act, the Education Amendments Act of 1972, supra. Armed with this knowledge, they voted in favor of Title IX, a clear indication of the intent of Congress that educational institutions such as Petitioner are subject to Title IX when its students receive BEOG's.[3]

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[3]The Education Amendments Act of 1972 as passed includes one other provision prohibiting discrimination on the basis of sex: Title IV, relating to the Student Loan Marketing Association. Pub. L. 92-318, 86 Stat. 235, at 265-170 (1972). Unlike the other titles in the Act, Title IV applies to

As this Court has noted, any interpretation of Title IX must take into account Title VI of the Civil Rights Act of 1964, after which it was patterned. Cannon v. University of Chicago, supra; North Haven Board of Education v. Bell, supra. Congress consistently has viewed both Titles as complementary and comprehensive bars to discrimination; they share parallel prohibitions and enforcement mechanisms. Id. As Senator Bayh stated on reintroducing Title IX in 1972:

> Central to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs.

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[3] (continued) private lending institutions rather than to educational institutions. It is worthy of note that, although Title IV contains aspecific prohibition against gender discrimination, none of the Titles applicable to educational institutions contains such a specific prohibition. It is fair to conclude that Congress saw no need to include a specific prohibition against gender discrimination in any part of the bill applicable to educational institutions, such as the BEOG program, because it was assumed that Title IX would apply.

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

118 Cong. Rec. 5,807 (1972). The same history was explained to the House of Representatives by Representative Mink:

> [Representative Erlenborn] states that it would be a dangerous precedent to empower the Federal Government to cut off funds from colleges and universities if they adopted discriminatory admissions policies. This precedent was established with the passage of the Civil Rights Act of 1964...I doubt whether we have to tell this House that funds have been stopped in accordance with powers already granted the Federal Government under that Act. This is no new precedent. It is simply an extension of an existing policy not to fund programs with taxpayers' funds which deny any individual equal protection of the laws.

117 Cong. Rec. 39,251-252 (1971).

In the case of Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974),

aff'd mem., 529 F.2d 514 (4th Cir. 1975), Title VI was held applicable to an educational institution which received federal dollars only through the tuition of students receiving Veterans Administration educational benefits under the GI Bill. Just as in the case before the Court, the institution argued that it could not be required to sign an Assurance of Compliance because it received no direct federal funding. Senator Bayh anticipated the court's decision during the initial Title IX debates. He noted that Title IX would authorize the Secretary of Health, Education, and Welfare to cut off all HEW funds to an offending institution, including aid to individual students, if the Secretary determined that would be the best course of action. 117 Cong. Rec. 30,408 (1971). Senator Bayh clearly was assuming that in a case such as the one before this Court, Title IX would apply to the institution due

to the receipt of funds by its students.

After the decision in Bob Jones, Senator McClure proposed an amendment to Title IX to limit its applicability to institutions that receive federal funding "directly from the federal government." Amend. 390, 122 Cong. Rec. 28,144 (1976). In the debate, Senator Bayh brought the Bob Jones case to the attention of the Senate. He noted that one result of the McClure amendment would be that Title VI would apply more broadly than Title IX. He argued that Congress had intended the opposite result: that both Titles apply equally broadly to eliminate discrimination in education. He concluded that the interpretation of Title VI in Bob Jones was precisely what Congress intended for Title IX.

> The matter before us or the specific vehicle which brings colleges under the regulations; namely, the receipt of direct or indirect Federal

> financial assistance directly to the university, but the inclusion of students who get Federal assistance is not unique. If we followed this route [passing the McClure amendment to limit applicability of Title IX to institutions receiving direct financial aid] then the next step is to repeal title VI of the Civil Rights Act because the court has held in other civil rights matters that if a student gets assistance from the Federal Government the university itself is assisted.
>
> The case of Bob Jones against Johnson is a specific case in question....
>
> The House committee studied this interpretation [that of the Bob Jones court]...It is not new law; it is traditional, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students.

122 Cong. Rec. 28,145 (1976).

Senator Pell reiterated that the court in Bob Jones correctly interpreted Title IX because the opposite interpretation would effectively exclude from coverage institutions whose students receive BEOG's:

> While these dollars are paid to students they flow through and ultimately go to institutions of higher

> education, and I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.

122 Cong. Rec. 28,145 (1976). The McClure amendment was defeated. 122 Cong. Rec. 28,147 (1976).

The defeat of the McClure amendment is further evidence that Congress has never abandoned its initial intentions with respect to Title IX. Congress understood that, under the language of Title IX and in light of the history of Title VI, indirect aid recipients would be prohibited by Title IX from engaging in sex discrimination. After the Bob Jones court reaffirmed this understanding, the Senate declined Senator McClure's invitation to amend Title IX to limit its applicability. Even before the Bob Jones decision, bills to limit Title IX to institutions receiving direct federal funding failed in both the House and the Senate. See, e.g., S. 2146, 94th Cong.,

1st Sess., 121 Cong. Rec. 23,845-847 (1975); H.R. Con. Res. 330, 121 Cong. Rec. 21,687 (1975); H.R. Con. Res. 329, 121 Cong. Rec. 21,687 (1975); H.R. Con. Res. 310, 121 Cong. Rec. 19,209 (1975); S. Con. Res. 46, 121 Cong. Rec. 17,300 (1975). This clear and continuing evidence of the support of the Congress for applying Title IX to indirect federal funding recipients cannot be ignored.

The Third Circuit decided in this case that the program run by Petitioner which is subject to Title IX is the entire institution. Grove City College v. Bell, supra, 687 F.2d at 700; see Haffer v. Temple University, 688 F.2d 14 (3d Cir. 1982). This interpretation of Title IX's "program or activity" language is fully consistent with the intent of Congress that all aspects of an integrated institution are within the coverage of Title IX. During the initial Title IX debates, Representative Green was

asked essentially the same question by Representative Steiger:

> Mr. Steiger of Wisconsin....In title [IX] [another member] asked relating to a program or activities receiving Federal financial assistance, and under the "program or activity" one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title [IX], to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?
> Mrs. Green of Oregon. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity. Discrimination would cut off all program funds within an institution.
> Mr. Steiger of Wisconsin. So that the effect of title [IX] is to, in effect, go across the board in terms of the cutting off of funds to an institution that would discriminate, is that correct?
> Mrs. Green of Oregon. The purpose of title [IX] is to end discrimination, yes, across the board...

117 Cong. Rec. 39,256 (1971)(emphasis added).

It would be ironic indeed if Petitioner could use its students' federally funded

tuition fees to pay the salaries of faculty and staff who may suffer gender discrimination in employment, contrary to the dictates of North Haven, while an educational institution that receives the same number of federally-supplied dollars through a direct grant could be prohibited from discriminating. The Congressional intent to avoid this result by means of comprehensive application of Title IX is seen nowhere more clearly than in the Congressional response to the argument that athletic programs in educational institutions are not covered by Title IX. In its initial Title IX regulations, the Department of Health, Education, and Welfare took the position that Congress intended athletic programs to be covered. 34 C.F.R. §106.41 (1980). Since athletic programs typically receive no earmarked federal funding, the basis for the regulation lies

in the role of athletics as a part of the total educational program of institutions receiving federal funding: discrimination in one part of an educational program cannot avoid infection the rest of the educational programs of the institution. In colleges such as Petitioner's, for example, any discrimination which may exist in one part of an integrated educational program cannot avoid infecting the other educational programs in the institution in which the federally-aided students may participate.

Hearings were held on HEW's Title IX regulations before the House Subcommittee on Postsecondary Education of the Committee on Education and Labor. Sex Discrimination Regulations: Hearings before the Subcommittee on Post-secondary Education of the Committee on Education and Labor of the House of Representatives, 94th Congress, 1st Sess., June 17, 20, 23, 24, 25, 26,1975(hereinafter "Postsecondary Hearings"). Chairman O'Hara

of the Subcommittee opened the hearings with the statement that their sole purpose was to review the regulations

> to see if they are consistent with the law and with the intent of the Congress in enacting the law. We are not meeting to decide whether or not there should be a title IX but solely to see if the regulation writers have read it and understood it the way the lawmakers intended it to be read and understood.

Id. at 1.

The Department's decision that title IX applies to athletic programs was the most controversial topic aired during the hearings. Secretary Weinberger explained that the decision to include athletic programs within the coverage of Title IX was based on the clear analogy between Title IX and Title VI of the Civil Rights Act of 1964. Since recipients of general, nonearmarked federal funds are subject to the strictures of Title VI in appropriate circumstances, they are also subject to the same extent to Title IX.

> [I]f the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in title VI, and that is why we used this interpretation in title IX.

Id. at 485.

Witnesses on both sides of the issue testified that athletic programs could be covered by Title IX only because the sponsoring institutions receive Federal aid; the athletic programs themselves receive virtually no earmarked federal funding. For example, Representative O'Hara asked the president of the American Football Coaches Association:

> Mr. O'Hara....You make the point that you don't believe that the intercollegiate athletic programs of an institution of higher education could be considered an education program or activity receiving Federal financial assistance?
> Mr. Royal. Yes, sir.
> Mr. O'Hara. In other words, under your interpretation, then, one would have to look at the particular activity of the institution to determine whether or not it was subject to the provisions of title IX and it is your belief that in

> the case of your activity it is not subject to the provisions of title IX? Mr. Royal. That is correct. We do not receive Federal funds to support our athletic programs.

Id. at 49. See, e.g., Id. at 90 (statement of Kathy Kelly, President, U.S. National Student Association); Id. at 98-99 (statement of John Fuzak, President, National Collegiate Athletic Association); Id. at 232-233 (statement of Dallin H. Oakes, President of Brigham Young University and Director and Secretary of the American Association of Presidents of Independent Colleges and Universities); Id. at 284-285 (statement of Norma Raffel, Head of the Education Committee of the Women's Equity Action League); Id. at 324 (statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women, Association of American Colleges).

Witnesses including members of Congress advised the Committee of their opinion that it was within the contemplation of Congress

to include athletic programs within the coverage of Title IX because athletic programs are integral parts of the programs offered by the educational institutions. Discrimination in one part of the institution cannot be severed from the rest. Furthermore, they noted, where a recipient receives the benefits of federal funding for one program, money will be freed for use in other programs of an integrated institution. See, e.g., Id. at 165-67 (statement of Representative Mink; Id. at 169-71 (statement of Senator Bayh); Id. at 199 (statement of Representative McKinney); Id. at 202 (statement of Representative Abzug); Id. at 324 (statement of Dr. Bernice Sandler); Id. at 217-18 (statement of Holly Knox). A good example of how an aid recipient may benefit from the resources that are freed by federal funding is present in the case at bar. If one hundred-forty of

Petitioner's students were not receiving BEOG's, they would need scholarship assistance to attend Petitioner's college. Petitioner need not provide the scholarships because the federal government is providing the students with assistance. Accordingly, Petitioner is free to use these resources on some other aspect of its program, such as athletics, if it should so choose.

Chief among the congressional witnesses was Senator Bayh, who had authored and introduced Title IX in the Senate. He summed up the testimony of many of the other witnesses:

> This objection to the coverage of programs which receive indirect benefits from Federal support--such as athletics--is directly at odds with the congressional intent to provide coverage for exactly such types of clear discrimination. For example, although Federal money does not go directly to the football program, Federal aid to any of the school system's programs frees other money for use in athletics.
>
> Without Federal aid a school would have to reduce program offerings or use its resources more efficiently. Title

> IX refers to Federal financial assistance. If Federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it, and I think that is rather clear.

Id. at 175.

Some members of the Committee were explicit in their acceptance of the Bayh testimony. Representative Chisholm, for example, said that athletic programs receiving indirect aid "must follow the guidelines." Id. at 65; see Id. at 153. Representative Buchanan asked why Title VI should apply to athletics if Title IX does not. "Should you say you don't have to have blacks on your football team or your basketball team because they are not specifically federally funded?" Id. at 95.

The Committee heard repeated, clear and unequivocal testimony that, unless amended, Title IX properly is interpreted as covering programs such as athletics in integrated institutions. Nonetheless, the members of the Subcommittee recommended no changes in

the Act. In light of the Committee's original intention to review the regulations to determine their consistency with the intent of Congress in enacting Title IX, the Committee's silence can only be interpreted as a decision by the Committee that the writers of the regulations did indeed correctly understand the intent of the Congress.

When the issue came to the floor of the House and the Senate, Congress followed the lead of the Committee. Efforts to disapprove the Title IX regulations in whole or in part have failed repeatedly. See Grove City College v. Bell, supra, 687 F.2d at 699. As this Court noted in North Haven, where the postenactment history of Title IX shows that Congress was made aware of the Department's interpretation of the Act and of the controversy surrounding that interpretation, the failure of Congress to

disapprove the regulations "lends weight to the argument" that the the Department's interpretation correctly reflects the intent of Congress. 456 U.S. at 534. Here, just as in North Haven, Congress was asked to disapprove the Department's regulations on the coverage of athletic activities and, after fully informing itself of the Department's interpretation of the Act and the controversy surrounding that interpretation, Congress refused to reverse the Department's decision.

In short, Petitioner's argument that Congress never intended Title IX's prohibition on sex discrimination to cover an entire institution where students are receiving federal assistance is not a new argument. It was made before the Congressional subcommittee charged with reviewing the regulations that interpreted Title IX. That subcommittee recommended no changes in the regulations and no changes in

the statute. Furthermore, despite the fact that it has amended Title IX in other respects, Congress has never given serious consideration to any amendment that would alter this aspect of the Department's interpretation of Title IX.[4] This clear evidence of Congressional intent cannot be ignored. See Cannon University of Chicago, supra, 441 U.S. at 687, n. 7.

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[4]In fact, the opposite is true. One major amendment to Title IX serves to ratify the argument that Congress intended that Title IX apply to all parts of an integrated educational institution. Congress exempted social fraternities and sororities from Title IX. Pub. L. 93-568, §3(a), 88 Stat. 1862. Senator Bayh argued in favor of the amendment on the ground that Congress never intended social fraternities and sororities to be covered by Title IX. Without the amendment, he noted, they would be covered because they receive relatively low rent from educational institutions. 120 Cong. Rec. 39,992 (1974). Like athletics, however, they receive virtually no earmarked federal funding. Unless Congress believed that all parts of an integrated educational institution were covered by Title IX, therefore, passage of this amendment would have been unnecessary.

Title IX, like Title VI, is "program-specific." What that term means in this case is clear: the entire college operated by evidence of Congressional intent cannot be Petitioner is covered by Title IX. As the Fifth Circuit said in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068(5th Cir. 1969),Title VI extends to the specific program receiving federal funding and to any program "infected by" the discrimination of the receiving institution. The sponsor of Title VI, Senator Humphrey, described its purpose as the total elimination of racial discrimination from programs funded directly by Federal grants and from programs affected by such grants. 110 Cong. Rec. 6,543 and 6,545 (1964). He noted that the limiting "program or activity" language in Title VI must be seen in light of this purpose: a means for insuring that Title VI's coverage is directed at the program with the racially

discriminatory impact, not at the program that has no such impact:

> Title VI does not confer a 'shotgun' authority to cut off all Federal aid to a State. Any nondiscrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies. Funds can be cut off only on an express finding that the particular recipient has failed to comply with that requirement. Thus, Title VI does not authorize any cutoff or limitation of highway funds, for example, by reason of school segregation. And it does not authorize a cutoff, or other compliance action, on a statewide basis unless the State itself is engaging in discrimination on a statewide basis. For example, in the case of grants to impacted area schools, separate compliance action would have to be taken with respect to each school district receiving a grant.

110 Cong. Rec. 6544 (1964).

It should be noted that the smallest unit mentioned by Senator Humphrey is a school district, not an individual school: any discrimination occuring in a unit of that size must have an impact on or "infect," in the term of the Finch court,

every school and program in the district. The clear analogy in this case is the entire institution run by Petitioner, not any smaller administrative or academic unit. Students paying tuition to Petitioner, it must be assumed, may take any course in the catalogue, use any auxiliary facility, study in any library, live in any dormitory, etc. To make any unit smaller than the entire institution subject to Title IX would be to exclude from coverage numerous aspects of student life in which federally-funded tuition-paying students may face or be affected by gender discrimination. Such an impact on or infection of the student's environment would not be permitted under Title VI. Likewise, it cannot be permitted under Title IX.[5]

---

[5]The impracticality of applying Title IX to subdivided parts of colleges such as Petitioner's also suggests that Congress did not intend that result. As Representative

The congressional intent that Title IX be applied comprehensively is reiterated in S. 149 and H.Res. 190, supra, both introduced this session. The hundreds of co-sponsors of these bills are of both sexes,

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[5](Continued) Mink testified during the Postsecondary Hearings,

> It is difficult to trace the Federal dollar precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of Congress to prohibit sex--or race or national origin--discrimination in the room with the title I projector, while allowing it in the adjacent room. Surely we do not want HEW investigators to be charged with tracing exactly which classes used the federally funded slide projector.
>
> Also, if this narrow interpretation of the scope of coverage were accepted for title IX, it might well be the wedge in the door for cutting back protection of racial and ethnic minorities under title VI of the 1964 Civil Rights Act. Such a narrow interpretation could open the floodgates for reversing 11 years of progress under title VI.

Postsecondary Hearings at 166; see Id. at 198 (Statement of Representative McKinney).

both parties, and both houses. They all share the common understanding that eliminating gender discrimination from the American educational environment is crucial to the future of American democracy and to the ability of women to achieve equity in the marketplace. The Resolution expresses their belief that:

> [T]itle IX of the Education Amendments of 1972 and regulations issued pursuant to such title should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.

Id.

The amici curiae strongly urge this Court to reject Petitioner's effort to limit the protections afforded by Title IX just as Congress has rejected it: only a broad and comprehensive application of Title IX comports with the intention of Congress.

CONCLUSION

Where an institution such as Petitioner receives the general benefit of federally-subsidized tuition payments, it cannot avoid the imposition of Title IX's prohibition against gender discrimination by contending that the prohibition applies only to those expenditures that are directly traced to a federal dollar that was given to the institution for a specific purpose. If Title IX applied only to the traceable federal dollar received by indirect aid recipients such as Petitioner, the funding termination sanction would be effectively nullified: the Department would be unable to show that the gender discrimination occurred in the one percent of teacher salaries or the three percent of library construction paid for by federal dollars. To impute such an intention to Congress is contrary to the overwhelming evidence that

Congress intended that the broad remedial purposes of Title IX be served by interpretations of the statute favoring comprehensive application.

The amici curiae urge this Court to give full weight to the intent of the Congress that Title IX be applied comprehensively and in a manner designed to eliminate gender discrimination from the American educational system. Institutions such as Petitioner cannot be allowed to avoid the strictures of Title IX and, by so doing, preclude American women from obtaining the education that is the backbone of American democracy and crucial to their efforts to obtain equality in this society.

Respectfully submitted.

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No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students, MARIANNE SICKAFUSE, KENNETH J. HOCKENBERRY, JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T.H. BELL, Secretary of U.S. Department of Education, HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WABASH COLLEGE AS AMICUS CURIAE

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BRIEF OF WABASH COLLEGE AS AMICUS CURIAE

Wabash College respectfully submits this Brief as *amicus curiae* in support of the Petitioners, filed upon the

written consent of the parties in accordance with Rule 36.2 of the Rules of this Court.*

INTEREST OF AMICUS CURIAE

Wabash College is a small, private, independent, non-profit institution of higher education located in Crawfordsville, Indiana. Since its founding in 1832, the College has maintained its independence from the institutions of government. The College has been and is now privately-funded and endowed, and it has every intention of continuing to achieve its educational purposes without seeking federal or state assistance.

Since 1832, Wabash College has also sought to maintain an academic environment free of any restraints on position, discourse, dialogue, or debate. The College views its ultimate function as the nurturing and growth of young minds, through guidance and challenge. To assure the realization of that goal the College allows its faculty to play a dominant role in the administration of the College, including matters that reach far beyond curriculum and course content, and maintains a student-faculty ratio of approximately 10 to 1. The College's singular goal is the creation of the best possible environment for teaching and learning.

At first blush, the College most logically might seem to be disinterested in this litigation, for as an historically all-male institution (since 1832) it would be by-and-large exempt from coverage under Title IX even if it did seek federal funding for one of its programs. *See* 20 U.S.C. §1681(a)(5). Yet Wabash College shares with co-educational colleges like Grove City College a status as critical to the educational processes of our Nation as it is unique. Wabash College, like Grove City College and other similar institutions, is *small, private* and *independent.* Like

* Written consents from counsel for the Petitioners and for the Respondent have been filed with the Clerk of this Court.

them, Wabash offers an alternative to educational institutions which either are administered by the government or have adopted postures so intertwined with the government as to create a relationship of dependency. Like Grove City College, Wabash College views as its perpetual duty the maintenance of a uniquely private educational forum harboring the active exercise of academic freedom. And like Grove City College, Wabash College views with alarm any unwarranted governmental or other presence, intervening frontally or by more invidiously tiny steps over time, which will compromise its independence.

Wabash College feels an obligation to speak out when it sees an attempt to compromise the independence of a sister institution by an unwarranted regulatory presence which simultaneously overreaches its statutory boundaries and treads upon constitutionally-guarded ground. That is why it writes, respectfully, to this Court.

SUMMARY OF ARGUMENT

The impropriety of the position of the Department of Education (hereinafter "DOE") in this case may be stated simply: operating in an area of constitutional sensitivity against a statutory scheme that expressly limits it to program-specific actions, DOE is attempting to use governmental payments to individual students as the premise for regulating the entirety of a private, independent institution of higher education which itself seeks no federal funds. Upon no (or the most tenuous) connections DOE would premise the utmost breadth of intervention and control. Such an operating principle for agency action cannot be sustained.

There is no doubt that the Constitution is sensitive to governmental intrusion upon the academic environment. This principle is reflected in the specific concepts of the individual rights of faculty and students, including First Amendment rights of free speech and association and Fifth

Amendment rights to liberty (including the liberty of free choice of educational institutions); in the corollary principles of academic freedom and institutional autonomy which are necessary to protect such individual freedoms; in the simple concept of privacy; and in the protection of these rights through the freedom of the entire university community. In each and all of these the Constitution clearly requires caution and explicit Congressional sanction, not regulatory excess, before a federal agency may tread onto the Nation's private campuses.

In the face of these concerns, and even acknowledging the admittedly legitimate purpose of using the federal purse to help eliminate the vestiges of prohibited sex discrimination at various levels of education, DOE bears the burden of justifying its total intervention into Grove City College through its use of funds received by individual students to support "institutional" application of Title IX and its regulations to Grove City. That burden is particularly high where, as here, DOE's desire to regulate the entire institution is so starkly contrary to the central, program-specific concept of its enabling legislation. DOE cannot sustain that burden:

First, the language and history of Title IX do not evidence Congress' affirmative intention, clearly expressed, that DOE regulate an entire educational institution merely because some of its students receive federal funds for use during their college years. To the contrary, the language of Title IX is expressly program-specific, not institution-wide. Even if one looks beyond the explicit language of the statute to the legislative history of Title IX, that history in fact supports its limited, program-specific language.

Second, DOE's interpretation ignores the fact that Title IX is by definition not an exhaustive effort to regulate educational institutions.

Third, DOE's interpretation of the statute in an effort to maximize its regulatory scope is illogical. Beginning at the

middle point of coverage of individuals under a program or activity, which program or activity directly receives federal funds, DOE uses a jurisdictional premise so restricted as to be nonexistent—the receipt by individual students of funds which may be spent outside the College—to justify an intervention—asserted authority to apply the regulations to the entire institution--so broad as to be unlimited. Such a regulatory scheme also has the absurd result of subjecting institutions whose programs participate directly in federal largesse to less intervention than those whose programs do not. And DOE's "remedy" under its interpretation affects first and foremost innocent parties—the students whom the funds are intended to assist.

Finally, other, less invidious alternatives are available to prevent sex discrimination in education. Both state and other federal laws exist to prohibit sex discrimination in education. If an educational institution chooses to be the conduit for distribution of federal funds to its students on their admission, that program of distribution may be viewed as the "program" for purposes of Title IX. Such a program-specific application would protect the government's legitimate interest in seeing that the funds are not distributed on the basis of sex while at the same time avoiding unwarranted total intervention into the institution. Should DOE desire to seek broader authority to intervene, it should at least be required to take the matter back to Congress for Congress' affirmative intent, clearly expressed, that such broad intervention is necessary to achieve the legislative purpose.

DOE simultaneously steps off of its statutory foundation and onto constitutionally sensitive ground. Such a combination of excesses cannot be tolerated.

ARGUMENT[1]

I.
PRIVATE HIGHER EDUCATION IS AN AREA OF CONSTITUTIONAL SENSITIVITY

A. Constitutional Sensitivity Is Required In Light of The Rights Created By Various Amendments

This Court has long recognized that our colleges and universities play a critical role in preserving and perpetuating liberty and freedom in the Nation. In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957), the Court found an invasion of liberties "in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread," and declared:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and mistrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

This principle from the plurality opinion of the necessary freedom of colleges and universities was echoed even more forcefully by Mr. Justice Frankfurter and Mr. Justice Harlan in their concurrence:

---

[1] Wabash College agrees generally with the positions taken by Grove City College in its Brief to this Court. In the interests of time, so precious to the Court, Wabash will not belabor this Brief by restating Grove City's arguments here.

> These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensible for fruitful academic labor.

354 U.S. at 262.[2]

In *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967), the majority reiterated the critical importance of diversity and freedom in higher education:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through

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[2] Mr. Justice Frankfurter also quoted with approval the following statement of the four essential freedoms of a college or university:

> 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine *for itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'

354 U.S., at 263 (Emphasis added). It takes little effort to see that DOE's regulations do intervene into these areas of essential freedom by establishing regulatory review of decisions regarding employment (34 C.F.R. §86.51 *et seq.*), access to course offerings (34 C.F.R. §86.34), institutional attitudes toward marital status and pre- or extra-marital sex (34 C.F.R. §86.40), allocation of housing and other financial resources (34 C.F.R. §86.32), and admissions (34 C.F.R. §86.21-.23).

> wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' (Citations omitted.)[3]

Of course where, as in Grove City's case, the members of the college community are brought together by common beliefs, including common religious pursuits, they are protected by constitutional concern not only for academic freedom but also for freedom of association. As stated in *N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1963):

> We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record....subserve such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.' NAACP v. Alabama, ex rel. Patterson [357 U.S. 449, 460 (1958)].

---

[3] Mr. Justice Powell has recently echoed this perception that, in education as elsewhere, freedom is perpetuated not through authoritative or orthodox action but through the tension of diversity. Quoting from both *Sweezy* and *Keyishian*, Mr. Justice Powell stated that attainment of a diverse student body

> clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.***
>
> ***As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.
>
> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment.

Regents of the University of California v. Bakke, 438 U.S. 265, 312-14 (1978).

These constitutional concerns are not limited to the college and its faculty. The freedom to choose which school to attend is a part of the student's "liberty" protected by the Fifth Amendment. In striking down a statute requiring that parents and students submit solely to the public view of education, because it "unreasonbly interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control," this Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of the Sisters, etc., 268 U.S. 510, 534-35 (1925).

Another constitutional pillar to the freedom of the academic environment is the concept of privacy. As Mr. Justice Douglas, delivering the opinion of the Court, noted in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), "[t]he First Amendment has a penumbra where privacy is protected from governmental intrusion." The peculiar education created by the relationships among and constitutional rights of the students, faculty and administrators within a private college is worthy of constitutionally-sanctioned privacy from unwarranted governmental intervention. Here, as in *Griswold*, it may be said that "[v]arious guarantees create zones of privacy," *id.* at 484, and "[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," *id.* at 485.

Mr. Justice Goldberg's concurrence in *Griswold* (joined by Mr. Chief Justice Warren and Mr. Justice Brennan) found additional support for the right of privacy in the

Ninth Amendment.[4] Finding that the clear meaning of the Ninth Amendment is that the rights expressly enumerated in the Bill of Rights are not an exhaustive listing of the rights of the people, Mr. Justice Goldberg acknowledged the existence of the right of privacy:

> I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."

381 U.S., at 494, quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas J., dissenting). He then quoted Mr. Justice Brandeis' summary of the constitutional guarantee of privacy in his dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), *overruled, Katz v. United States*, 389 U.S. 347 (1967):

> "[The makers of our Constitution] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Id.

This Court also expressly has recognized that it is not merely the individuals but the entire university whose freedoms must be protected, for the freedoms of the individual members of the university community mean little if anything if the university itself is not free:

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[4] The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others *retained by the people*." (Emphasis added.) The Tenth Amendment also makes clear that what powers are not delegated to the Federal Government are retained by the States *and the people*: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." (Emphasis added.) Regardless of the perspective of a right to privacy retained by the people, under the Ninth Amendment, or the need for delegation of regulatory power by the people acting through Congress, under the Tenth Amendment, there is clearly a presumption that, where constitutional rights are implicated, the federal government's regulatory agencies may not fill unregulated gaps without Congressional authority. *See* the discussion *infra* at pp. 12-14.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By Pierce v. Society of Sisters, supra, the right to education one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. State of Nebraska, supra, the same dignity is given the right to study the German language in a private school. *In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes* not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Martin v. City of Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313) and freedom of inquiry, freedom of thought, and freedom to teach (see Wieman v. Updegraff, 344 U.S. 183, 195 73 S.Ct. 215, 220, 97 L.Ed. 216)—indeed *the freedom of the entire university community.* Sweezy v. State of New Hampshire, 354 U.S. 234, 249-250, 261-263, 77 S.Ct. 1203, 1211, 1217-1218, 1 L.Ed2d 1311; Barenblatt v. United States, 360 U.S. 109, 112, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115; Baggett v. Bullitt, 377 U.S. 360, 369, 84 S.Ct. 1316, 1321, 12 L.Ed.2d 377. *Without those peripheral rights the specific rights would be less secure.* And so we reaffirm the principle of the Pierce and Meyer cases.

Griswold v. Connecticut, 381 U.S. at 482-83 (emphasis added). Nowhere is the protection of the freedom of the institution from unwarranted external interference in order to protect the freedoms of its members—faculty and

students—more logical or justified than in the context of the small, private, independent college.[5]

B. Such Constitutional Sensitivity Requires That DOE Act Only With Caution And Explicit Congressional Sanction

This review of examples of the Court's prior recognition of constitutional sensitivities to governmental intrusion into the mix of rights inherent in the academic environment—be they based on expression, association, choice or privacy, in the individual context or as to "the freedom of the entire university community," *Griswold*, 381 U.S. at 482—demonstrates the Court's view that the processes of academic freedom operate most effectively when they are left alone. We make no claim that such rights constitute an absolute privilege against governmental intervention. What we do believe, however, is that these constitutional premises clearly require caution, not abandon, express Congressional sanction, not regulatory excess, when a federal agency seeks to extend its influence onto the Nation's campuses, particularly those of small, private, independent colleges.[6]

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[5] We believe that in the appropriate context a private institution of higher education may assert on its own behalf a constitutional right of free expression, association, liberty (of choice) or privacy, particularly where, as here, it acts on behalf of its college community vis-a-vis' the government. In the same way that the rights of private individuals occasionally must be protected from unwarranted intrusion by governmental institutions of education, so must the rights of private institutions of education occasionally be protected from unwarranted intrusion by the government. However, such a holding is not necessary to sustain the Petitioners' position in this case. As noted further below, the importance of these constitutional principles in this context is to require the government to act only with the affirmative intention of Congress, clearly expressed, and then only with precision and in the most narrow means possible; the "institutional" interpretation DOE has applied to Grove City fails all these tests.

[6] The *effect* of the government's intrusion on the academic environment of an institution will of necessity vary based on the size and nature of the

(Footnote continued on following page)

Even in the context of a "legitimate and substantial" purpose, when the government's action ventures into the realm of constitutional rights it must take the narrow path:

> There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'

Keyishian, 385 U.S. at 602, quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). As the Court there declared further, immediately after quoting from *Sweezy*, 354 U.S. at 250, that "[t]he essentiality of freedom in the community of American universities is almost self-evident":

> We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405; '[f]or standards of permissible statutory vagueness are strict in the area of free expression, too. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' Id., at 432-433, 83 S.Ct., at 337-338.

385 U.S. at 603-04.

Similarly, in *Sweezy*, the Court struck down action by a state attorney general because the action infringed on constitutional rights (including academic freedom) and was not based on the clear authority of the legislature. The Court first declared that

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school. Agency presence or intervention which may be viewed as a mere cost of doing business for a 30,000 student state university, because it is diffused through administrative levels and is merely an addition to the existing burdens accepted by the faculty and students used to dealing with the university's own bureaucracy, may be viewed as a significant disruption to a small private college whose administration is chosen from and closely a part of the faculty.

> [i]t is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.

354 U.S. at 245. Then, noting both that "*it cannot be stated authoritatively* that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated," *id.* at 253 (emphasis added), and that "[t]he lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority," *id.* at 254, the Court struck the actions as violating due process requirements.

The principle of requiring authoritative indications of a Congressional foundation for agency intervention into constitutionally sensitive areas has recently been reaffirmed in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Citing a series of precedents,[7] the Court there held that because the exercise by the NLRB of jurisdiction over parochial schools would give rise to "serious constitutional questions," the Court had to identify "the affirmative intention of the Congress clearly expressed" before concluding that the NLRB's enabling legislation granted jurisdiction over the schools. *Id.* at 500-01. Notwithstanding that the National Labor Relations Act defined the Board's jurisdiction in very broad terms, and relying upon a provision of that Act which, like the program-specific provisions of Title IX, indicated a Congressional sensitivity to First Amendment issues, the Court found no such "affirmative intention of Congress clearly expressed" and denied the Board jurisdiction over the schools.

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[7] *See, e.g., McCulloch v. Sociedad Nacional de Marineras de Honduras*, 372 U.S. 10 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

II. DOE'S "INSTITUTIONAL" INTERPRETATION IS INVALID AS AN UNWARRANTED INTERVENTION

The ability of an agency of the federal government to regulate the entirety of a private, independent educational institution merely because some of its students receive federal funds raises "serious constitutional questions" about the proper foundation necessary for governmental presence and regulation in higher education. In light of the lack of any "affirmative intention of Congress clearly expressed," the patently non-exhaustive scope of the legislation, the illogic of the agency's interpretation, and the availability of other less invidious means to achieve regulatory purpose, DOE's "institutional" approach must fail.

A. Grove City Properly Raises This Issue Now

It cannot seriously be disputed that the government has a legitimate purpose in using the federal purse to help eliminate vestiges of prohibited sex discrimination at the various levels of education. And it certainly cannot be seriously claimed that the constitutional rights identified above create absolute walls against the exercise of legitimate governmental perogatives on the campus. What is clear, however, is that when such important constitutional concerns are implicated by governmental action in the academic arena, the propriety of the depth and breadth of the government's intervention must be viewed with a cautious and critical eye. "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). What cautions apply to an elected Congress, which directly exercises the will of the people, apply with even greater force to an appointed government agency, which does not.

It is also not necessary, much less appropriate, that those affected by overbroad governmental intervention into private education wait until the agency strikes at the absolute core of the constitutional rights involved. That principle of total intervention across the breadth of the educational institution which DOE would have this Court allow to be established today because the depth of DOE's intervention is claimed to be shallow will still stand tomorrow when the agency inevitably seeks to probe deeper into the workings of the institution, to the heart of its freedoms. From the perspective of the private college, the first unwarranted step onto its toes is as fatal as the last into its heart, because the principle—that the agency may tread on the collegial body without clear Congressional authority—has been established. As Mr. Justice Frankfurter stated in his concurrence in *Sweezy*, after noting the "four essential freedoms" of the university:

> I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The admonition of this Court in another context is applicable here. 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'

354 U.S. at 263-64 (quoting *Boyd v. United States*, 116 U.S. 616, 635).

B. DOE Cannot Satisfy Its Burden To Sustain its "Institutional" Interpretation

In this context, where constitutional considerations are implicated, it is the agency's burden to demonstrate that its desired intervention is justified, not only by the legitimacy of some ultimate statutory purpose but by the "affirmative intention of Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. at 500-01. This is particularly so where its stated desire to regulate the entire breadth of

an educational institution is so starkly contrary to the central, program-specific concept of its enabling legislation. DOE's claim of pervasive jurisdiction cannot satisfy this burden.

1. DOE's Interpretation Is Contrary To The Program-Specificity of Title IX

The language of Title IX, 20 U.S.C. §1681-1686, is *program-specific* throughout its provisions. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926 (1982). This Court there noted that the language of the statutory prohibition of §901(a), 20 U.S.C. §1681(a), and the statutory language in §902 authorizing DOE both to issue regulations and to terminate funds, 20 U.S.C. §1682, are program-specific and that the legislative history of Title IX "corroborates its *general* program specificity." *Id.* (emphasis added). The Court concluded:

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§901 and 902.

Id. Significantly, as the Court stated in *North Haven*, "Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds." *Id.* Thus, there is evidence not only that Congress mandated DOE *to be* program-specific, but also that Congress implicity mandated DOE *not to be* institution-general. Yet that is precisely what DOE now claims to have the authority to do. In light of the program-specificity confirmed by *North Haven*, DOE's institution-wide application of the regulations can hardly be found to be supported by "the affirmative intention of Congress, clearly expressed."

If one looks past the ruling in *North Haven* and the language and particular legislative history of the program-specific requirements of Title IX, one still finds no such clear expression of affirmative intent. As Grove City discusses in detail in its Brief, there is substantial

legislative history that suggests that Grove City is not even a recipient of federal financial assistance. Even looking to the entirety of the legislative history (and ignoring Congress' refusal to adopt proposals reaching all practices of an institution receiving federal funds), it is at worst inconclusive as to DOE's claim of authority to regulate the entire institution. Such inconclusiveness does not "affirmative intention clearly expressed" make.

2. Title IX Is Not Exhaustive Legislation

DOE ignores that its statutory mandate does have limits. In enacting Title IX Congress did *not* attempt to regulate every educational institution in America. Title IX contains no general prohibition of sex discrimination in education. Implicit in this statement, in the program-specific language of Title IX itself, and in Congress' refusal to adopt proposals that would prohibit all discriminatory practices even of institutions that directly receive federal funds, is the conclusion that DOE, in its regulatory zeal, cannot ignore: there are areas of educational activity that Congress did not intend Title IX to reach.

Such a conclusion can hardly be said to frustrate DOE's regulatory purpose. Those few areas not so covered (including either institutions themselves, like Grove City College, or those portions of institutions which are not part of the program directly receiving federal funds)[8] are the exception to DOE's ability to make efforts to ensure compliance with Title IX in the thousands of primary and

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[8] *See, e.g., Hillsdale College v. Dept. of Education, et al.*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. pending* (82-1538). Under the Sixth Circuit's theory in *Hillsdale*, Title IX itself might be applied to a disbursement program (but not the entire institution) of a college which chooses to be a conduit for distribution of federal funds to its students. Such a limited program-specific application of Title IX would protect the government's legitimate interest in seeing that the funds are not distributed on the basis of sex discrimination prohibited by Title IX but would avoid unwarranted total intervention in the educational institution. Because Grove City College does not even act as a conduit for the distribution of such funds, it would in any case lie wholly beyond the statute's reach.

secondary schools, public universities and many private institutions of higher education in this Nation. Its actions here lie not only outside its regulatory authority but also at the outermost fringe of its practical concern for results. Moreover, the gap left by Congress is not a void. Other laws, both state and federal, exist to redress discrimination in education. *See, e.g.*, 17 PA. CONS. STAT. ANN. §500, *et seq.* (Purdon 1981); IND. CODE ANN. 22-9-1-1 to -13; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 to -17.

3. DOE's Interpretation Is Illogical

DOE's interpretation of Title IX in an effort to maximize its regulatory domain is also illogical. DOE's enabling legislation clearly contemplates receipt of federal funds by an institution for use—assistance[9]—in a particular program or activity; the coverage of the statute (and DOE's regulatory authority) applies to treatment of individuals under the program or activity receiving federal funds. DOE's interpretation—that receipt by the individual student involves coverage of the entire college—jerks its jurisdictional premise and its desired regulatory intervention in opposite directions. DOE uses the most tenuous of jurisdictional premises, if any at all—the receipt by individual students of funds which may be spent on goods or services purchased from, or not from, the college, at their choice—to justify an intervention—asserted authority to apply its regulations to the entire college—so

[9] When the federal government provides a local school system with funds to assist it in providing services free of charge to the children of its constituents it is doing an act very different from providing an individual student with funds to assist her or him in buying services rendered (including not only from a college but also from housing sites, book stores and others unrelated to the college). In one case, the educational institution stands as the direct recipient of assistance; in the other, the student is the recipient and the educational institution stands only as one among many entities compensated for providing services to the student.

broad as to be unlimited. While DOE's jurisdictional foot slides right, its regulatory foot slides left; DOE cannot sustain such an illogical split.

Indeed, under the "logic" of DOE's interpretation institutions which seek no federal aid at all would suffer *more* intervention by DOE than those institutions which affirmatively seek direct federal aid and whose programs participate *directly* in federal largesse. If Grove City seeks a grant of funds to build a new music center, *only* that specific activity (and presumably the College's specific music programs) would be covered by Title IX and the regulations; other programs would not. But if Grove City seeks no federal funds but receives certain tuition payments from some students, part of which may be paid with assistance to the student from the federal government (even if in dollars orders of magnitude less than a building grant), *everything* Grove City does would be covered and subject to DOE's regulatory intervention. Such a result cannot have been intended by a Congress which affirmatively rejected legislative proposals to cover all practices of an institution receiving federal funds. *North Haven*, 102 S.Ct., at 1926.

Finally, as the Grove City case makes clear, DOE's "remedy" under its institution-wide theory affects first and foremost innocent parties—the students. In return for Grove City's simple refusal to permit DOE to extract an unauthorized commitment to institution-wide coverage in return for the ability of some of its students simultaneously to exercise their constitutional right to freedom of choice of an educational institution and their statutory right to receive federal aid, DOE would require the students to sacrifice either their constitutional right—to choose their educational institution—or their statutory right—to

receive federal aid to which they are otherwise entitled.[10] That this occurs in the context of a stipulation that Grove City does not engage in any discrimination prohibited by Title IX only makes DOE's desired result all the more obnoxious and repulsive.

4. Other Means Exist To Satisfy DOE's Goal

As noted above, other state and federal laws contain prohibitions of sex discrimination applicable to education. The Sixth Circuit's analysis in the *Hillsdale College* case would ensure nondiscriminatory distribution to the students of such funds as are actually received by the institution under such distribution program without unwarranted intervention into the rest of the entire institution. If, notwithstanding this other, less invidious interpretation, DOE desires further to broaden its authority to review educational affairs consistently with Title IX as it is now written, DOE can always attempt to utilize the procedure expressly established by §902, 20 U.S.C. §1682, for Congressional review and disapproval of regulations. And, of course, if DOE desires that the program-specific limitations which lie at the heart of Title IX be removed, it can ask Congress to pass legislation to do so. DOE nowhere considered any such alternative interpretation, nor did it seek to obtain Congress' "affirmative intention clearly expressed." Instead, DOE sought to expand its domain to the entire educational institution, without (indeed contrary to) Congressional authority and in disregard of the constitutionally-sensitive role of an educational forum free of unwarranted governmental presence. It cannot be permitted to do so.

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[10] In this sense neither Grove City nor its students have a truly voluntary choice to "forego" the funds received by the students, and DOE's interpretation clearly falls within the spectrum of "unconstitutional conditions" upon the exercise of statutory rights long prohibited by this Court. *Sherbert v. Verner*, 374 U.S. 398, 405-07 (1963); *Frost v. Railroad Comm. of State of California*, 271 U.S. 503, 593-94 (1926).

III.
CONCLUSION

We come then full circle to a clear view of the proper relationship between the admittedly legitimate purpose of Title IX, its inherently and expressly specific scope, and the constitutionally sensitive ground to which it is applied. The constitutional concerns implicated by governmental intervention into the realm of private higher education and the program-specific language of Title IX contain the same kernel of limitation on regulatory action. Even in the context of legitimate legislative purpose, Congress recognized that countervailing concerns formed a substantial additional reason for placing a boundary on governmental intervention into higher education. The program-specific language of Title IX constitutes the mechanism for establishing precisely that boundary. DOE's "institutional" approach to its regulation of Grove City College violates that boundary. It cannot be allowed to stand.

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No. 82-792-CFX
Status: GRANTED

Title: Grove City College, Individually and on behalf of its students, et al., Petitioners
v.
Terrel H. Bell, Secretary of Education, et al.

Docketed:
November 9, 1982

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Lascell, David M.

Counsel for respondent: Bator, Paul M.

Entry	Date	Note	Proceedings and Orders
1	Nov 9 1982	G	Petition for writ of certiorari filed.
2	Nov 9 1982		Appendix of petitioner Grove City College, et al. filed.
4	Dec 14 1982		Order extending time to file response to petition until January 14, 1983.
5	Jan 17 1983		Order further extending time to file response to petition until January 21, 1983.
6	Jan 21 1983		Brief of respondents Bell, Sec. of Education, et al. in opposition filed.
7	Jan 21 1983		Record filed.
8	Jan 21 1983		Lodging received.
9	Jan 26 1983		DISTRIBUTED. February 18, 1983
10	Feb 7 1983	X	Reply brief of petitioner Grove City College, et al. filed.
11	Feb 22 1983		Petition GRANTED.
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13	Mar 11 1983		Order extending time to file brief of petitioner on the merits until June 7, 1983.
14	Apr 8 1983		Brief amicus curiae of Pacific Legal Foundation filed.
15	Jun 6 1983		Brief amicus curiae of Equal Employment Advisory Council filed.
16	Jun 7 1983		Brief amicus curiae of Wabash College filed.
17	Jun 7 1983		Brief amicus curiae of Hillsdale College filed.
18	Jun 6 1983		Brief amicus curiae of Mountain States Legal Foundation, etc. filed.
19	Jun 11 1983		Joint appendix filed.
20	Jun 11 1983		Brief of petitioners Grove City College, et al. filed.
21	Jun 20 1983		Record filed.
22	Jun 24 1983		Record filed.
23	Jun 24 1983		Certified C. A. proceedings received.
25	Jun 27 1983		Order extending time to file brief of respondent on the merits until August 8, 1983.
26	Jul 1 1983	D	Motion of American Association of University Women, et al. for leave to file out-of-time motion for leave to participate in oral argument as amici curiae filed.
27	Aug 5 1983		Brief amicus curiae of The Council of Collegiate Women Athletic Administrators filed.
28	Aug 5 1983		Brief of respondents filed.
29	Aug 5 1983		Brief amicus curiae of The Laywers' Committee for Civil Rights Under Law filed.
30	Aug 8 1983		Brief amicus curiae of Am.Assoc. of University Women,, et al. filed.
31	Aug 8 1983		Brief amicus curiae of Mexican American Legal Defense and

No. 82-792-CFX

Entry	Date	Note	Proceedings and Orders
			Educational Fund filed.
32	Aug 8 1983		Brief amicus curiae of Members of U.S. Congress filed.
33	Aug 16 1983		CIRCULATED.
34	Aug 23 1983		Motion of American Association of University Women, et al. for leave to file out-of-time motion for leave to participate in oral argument as amici curiae DENIED.
35	Sep 7 1983	D	Motion of American Association of University Women, et al. for reconsideration of order denying motion for leave to participate in oral argument as amici curiae filed.
36	Sep 16 1983		Response of Solicitor General to motion of American Assn/University Women to reconsider order denying
37	Sep 16 1983		motion for leave to participate in oral argument as amici curiae filed.
39	Oct 3 1983		Motion of American Association of University Women, et al. for reconsideration of order denying motion for leave to participate in oral argument as amici curiae DENIED.
40	Oct 24 1983		SET FOR ARGUMENT. Tuesday, November 29, 1983. (1st case) (1 hour)
41	Nov 18 1983	X	Reply brief of petitioners Grove City College, et al. filed.
42	Nov 29 1983		ARGUED.
43	Dec 1 1983	G	Motion of the Solicitor General for leave to file a supplemental brief after argument filed.
44	Dec 2 1983		Opposition of Grove City College to motion of respondent Bell, Sec. of Ed., et al. filed.
46	Dec 5 1983		Motion of the Solicitor General for leave to file a supplemental brief after argument GRANTED.